

A

Law Grammar;

OR

Rudiments of the LAW:

COMPILED

From the Grounds, Principles, Maxims, Terms, Words of Art, Rules, and Moot-Points of our Law, in a new, easy and very concise Method.

For the particular Instruction

Of all young Gentlemen, either at Schools, Colleges, or the Universities, or privately educated, Attorneys Clerks, and other Persons; Whereby they will acquire a great deal more useful Learning in the Law, than by any of the Books yet published.

By *GILES JACOB*, Gent.
Author of the *New Law-Dictionary*.

Lex Neminem cogit ad Vana, seu inutilia. 1 Inst.

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with Additions.

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THE P R E F A C E.

THE great Oracle of the Law, Sir Edward Coke, has observed, that there is no Learning so excellent for all Sorts and Degrees of People, as the Knowledge of the Common Law of England; and tho' in the Study of it, at the Beginning it seems difficult, yet when a Person dives to the Depth thereof, it is greatly delightful, and he which reaches deepest sees the admirable Secrets of our Law.

The famous Chancellor Fortescue, in his learned Treatise De Laudibus Legum Angliae, likewise observes that the Latin Words Jus and Lex intend the Law under the Consideration of a Science; wherefore he says, after you have made some Progress in common Grammar, it will be necessary and sufficient to use the same Method and Proportion in the Study of the Law: And as Etymology, Orthography, Prosodia and Syntax are the Springs and Fountains of Grammatical Learning; so the Principles,

Causes and Elements, are the Foundation of Learning in the Law.

On considering what has been so wisely observed by two such most Learned, Excellent and Worthy Persons, I have very great Encouragement; to which I may add, that as among the liberal Sciences, the Art of Grammar has always the Precedency, it being Janua omnium Artium, the Portal by which we enter into the Knowledge of all Arts, and whereby we communicate ourselves and Studies to others; It is from all these Considerations, that I have at length, tho' late, now attempted a Grammar of the Law, contained in the several distinct Heads or Chapters, of Definitions, Grounds and Principles, Maxims and General Rules, Moot-Points or Cases, Words of Art and Terms, and Fictions, &c.

Under this Division of Titles, is here comprised a general Knowledge of our whole Law, in a brief Epitomy; and the best Method of Instruction: And I think there is no room to question that in great Schools, and particularly at Colleges in the Universities, before the diligent Scholars leave those Academies, some chosen Lessons or Sentences got by Heart from this Law Grammar, and daily repeated with their other Learning, would be a singular Benefit and Advantage to them; not only in their future Conversation with others, but

The P R E F A C E.

iii

but also in preserving their own Estates and Fortunes, and Lives and Liberties, and by keeping them out of Danger, especially the greatest, that of offending the Law.

To that good End and Purpose, I have been fuller in treating of all the Crown-Laws, relating to Offences, than on any other Laws or Statutes, being very sensible they most concern Mankind in general, and preserve and establish the Peace of the Kingdom, without which Provisions there are many Persons in the World who, like fierce and savage Wolves, would prey upon and devour one another.

But in this extensive Law Branch, and indeed every where else, my Discourse I have generally confined to short Periods, having divided all long Sentences, the more effectually to impress Things on the Memory, and there to retain them; and likewise to make the Matter of the greatest Importance, appear the most Conspicuous and Remarkable, by separating it from the rest; which new Method of Handling our Laws, I think is in some Sort Academical.

Further, I have here inserted a great Number of the choicest Latin Maxims of the Law, beyond what otherwise I should have done, but with a Design to please, as well as instruct all Youth at our Universities, or Inns of Court,

and young Gentlemen in their private Education; also sometimes I have made small Philosophical and other Digressions, for their better Improvement and Entertainment.

On the whole, the following little Tract is a quite New Essay, there being no Treatise any ways like it hitherto published, and therefore 'tis to be hoped it will be favourably received by every impartial Reader, since I may truly assure them, it throughout contains very Material and Useful Information,

Multum in Parvo.



G. JACOB.

A Law

A

Law Grammar.

LAW, in general, is defined to be a certain Rule for the well-ordering of Civil Society ; or it is an Art directing to the Knowledge of Justice.

Lex est Sanctio justa jubens Honestia & prohibens contraria.
Bracton.

The Subjects of it I divide into Six Parts.

Page 1	I. Definitions.	IV. Moot Points or Cases,	Page 96
4	II. Grounds and Principles.	V. Words of Art and Terms.	121
35	III. Maxims and General Rules.	VI. Fictions, Intentments, &c.	130

I. Of particular Definitions.

AND Laws are held to be either *Natural*, or *Arbitrary*.

1. The *Natural Laws* are such as in themselves are just and good, and binding in all Places, for they are every where the same, being from God himself.

2. The *Arbitrary Laws* are Institutions made by Men, founded on Convenience, and which depend on the Authority of the Legislative Power that made them : They are designed for maintaining publick Order.

Of Definitions.

But all Laws, according to *Fortescue*, derive their Force à *lege Naturæ*, from the Law of Nature; and limited *Law of Nature* is the Law now used in every State. *Fortescue*.

The Laws of *England* are divided into three Sorts.

1. The **Common Law**, which is taken for the Law of *England* simply, without any other Law whatsoever, before any Statute was enacted to alter the same: It is grounded on the general Customs of the Realm.

This Law (says *Lord Hale*) is singularly adapted to the Frame of our Constitution.

'Tis that which maintains and provides for the Safety of the King's Person, his Crown and Dignity, and all his just Rights and Prerogatives.

And this Law is also that which declares and asserts the Rights and Liberties, and Property of the Subject. *Hale's Hist. L.*

2. The **Statute Law**, or Statutes made by the King and both Houses of Parliament, which are usually for providing against new Mischiefs and Evils that arise by the Corruption of the Times.

3. Particular **Customs** in divers Parts of the Kingdom, used by the People, and found to be beneficial, and which being continued Time out of Mind without Interruption, have obtained the Force of a Law, to bind the Places, Persons and Things concerned therein. *Coke Lit.*

Confuetudo pro Lege servatur.

But our **Laws** have a larger particular Division, into these following, *viz.*

1. The *Crown Law*, concerning the King and his Prerogative.

2. The *Law and Custom of Parliament*, to determine Matters there done.

And by *Holt*, Chief Justice, this Law ought to be determined in the *King's Bench*, where any Question arises thereon. *Raymond*.

3. The *Common Law*, that is common to the whole Kingdom.

4. The *Statute Law*, enacted in Parliament.

5. *Reasonable*

Of Definitions.

3

5. *Reasonable Customs*, established by long Usage.
6. The *Law of Arms*, relating to War and Martial Affairs.

But what is called the *Martial Law* may not be exercised on Persons in Time of Peace, when the King's Courts are open for Justice; except it be by authority of Parliament, as is of late Times done by annual Acts for punishing Mutiny and Desertion in the Army.

7. *Ecclesiastical or Canon Laws*.
8. The *Civil Law* used in certain Cases.

For the Use of these two last Laws here in *England*,
see *Post*.

9. The *Forest Law*, for preserving the King's Game.
10. The *Law of Marque and Reprisal*, to redress People injured at Sea.
11. The *Law-Merchant*, proper to Merchants, and differing from the *Common Law*, but become a Part of the Laws of the Realm, &c.

As to the *Civil and Canon Law*.

1. The *Civil Law* is that Law which every particular Nation or Commonwealth has peculiarly established for itself.

Jus Civile est quod quisque Populus sibi constituit.

In a stricter Sense, it denotes that Law which the old *Romans* made Use of, and was compiled from the Laws of Nature and Nations; also the *Twelve Tables* were the Foundation of it, which are highly esteemed for their great Equity.

This Law is allowed here in the two Universities of *Oxford* and *Cambridge*, for training up Students, &c. In Matters of foreign Treaties, Marine Affairs, ordering Martial Causes, Judgments of Ensigns and Arms, Rights of Honour, &c.

2. The *Canon Law* signifies the Law of the Church, and consists of certain Rules taken out of the Scripture, the Writings of the Fathers, the Ordinances of General Councils, and Decrees of Popes in former Ages.

4 Of Grounds and Principles.

The general *Canon Law* is no farther in Force in this Kingdom, than it has been received here, and is consistent with either our Common or Statute Law.

Though we have particular *Canons* made in the Convocation, and having the King's Royal Assent, for the Government of the Church, Religion, and the Clergy, &c.

Which are warranted by Act of Parliament, and deemed the Laws of this Land. *Can. Jac. 1.*

II. Of Grounds and Principles.

BY Grounds are meant the Foundations, and by Principles the efficient Causes of Things; and Elements are the Matter and Form thereof.

The several Grounds of the Law of *England*, in ancient Authors, are said to be these.

1st, The *Law of Reason*, which is observed in this Realm, as in all others; and Reason is the Gift of God to Man, or Power of the Soul that discerns between Good and Evil, comparing the one with the other, and which shews Virtues, loves Good, and flies Vices; from whence it is termed the first Rule, that all Things must be ruled by.

2dly, The *Law of God*; and therefore it has been formerly inquired in divers Courts, if any Persons held Opinions secretly or otherwise against the true Catholic Faith; or if any general Custom were contrary to the Law of God, or any Statute was made directly against it.

3dly, The *general Customs*, of old Time used throughout all the Land, which have been ever approved by the King and all his Subjects, as being neither against the Law of God nor the Law of Reason; and which are properly called the *Common Law*.

4thly, The *Law-Maxims*, consisting of divers Principles that have always been taken for Law in this Realm; and what is a Maxim or general Custom, and what is not, shall be determined by the Judges.

5thly, The *particular Customs* used in several Counties, Towns, Cities, and Lordships of the Realm; and these, because they are not contrary to the Law of Reason, nor the

Of Grounds and Principles. 5

the Law of God, though against the general Customs or Maxims of our Law, yet they stand in Effect for Law.

6thly, The *Statutes* enacted by our Lord the King, and by the Lords Spiritual and Temporal, and the Commons in divers Parliaments, in such Cases where the Law of Reason, the Law of God, Customs, Maxims and other Rules of Law, have not been sufficient to punish evil Men, and reward the good.

There are no other Grounds of the Laws of *England*; though according to Lord *Coke*, the *Common Law* is the common Birth-right that the Subject hath for the Safeguard and Defence of his Liberties and Properties, *viz.* not only of his Goods, Lands and Revenues, but also of his Wife and Children, Body, Fame and Life. *Co. Lit.*

On the Foundation of our Laws, and from natural Principles of Justice, every Person is intitled to his *Life, Liberty and Property*, who has done no Act to forfeit either.

A Person's Life may be unlawfully taken away divers Ways, as in Cases of Murder, Manslaughter, Poisoning, &c.

A Man's Liberty may be affected in several Manners, as by false Arrest, and wrong Imprisonment, &c.

And a Person's Property may be trespassed upon and lost, by taking away his Goods, committing Felony, Robbery, or Burglary.

The Life of the *King*, as he is Head of the Commonwealth, is most precious in the Eye of our Law, wherefore Attempts against him are deemed Treason; and the Crimes touching Life, are the following.

1. **Treason**, which in general signifies a Betraying, is divided into *High Treason*, and *Petty Treason*: The first of which is defined to be an Offence committed against the Security of the King or Kingdom;

As to compass or imagine the Death of the King, Queen, or Prince, their eldest Son and Heir; and declaring the same by some open Deed;

Or to levy War against the King in his Realm; Or to adhere to the King's Enemies, or give them Aid within the Realm or without;

Or to violate the King's Wife, or his eldest Daughter unmarried, or the Wife of the Prince;

6 Of Grounds and Principles.

Or to counterfeit the King's Great Seal, Privy Seal, or his Money;

Or to kill the Chancellor, Treasurer, or any of the King's Justices of either Bench, Justices of Assise, &c. in their Place doing their Offices.

These are all declared Treason by the Statute 25 E. 3. cap. 2. And as to what is an open Act, a Design to depose or imprison the King, is an overt Act to manifest a compassing of his Death.

Conspiring the *Death of the King*, providing Weapons to effect it, or sending Letters to second it; assembling People to take the King into their Power, and writing to a foreign Prince inciting to Invasion, are overt acts. *Hale's P. C.*

A compassing by bare Words, was formerly held to be no overt Act of Treason; but since it has been adjudged otherwise, where the Words shew a direct Purpose against the King's Life; then they amount to an overt Act of compassing or imagining his Death. *Keling's Rep.*

Words though set down in Writing, if kept privately in a Man's Closet, are no overt Act, except they are published. *Hawkins's P. C.*

The Law judges every Rebellion to be a Plot against the King's Life, and a Depositing him.

And under compassing and imagining the King's Death, Intention of Treason proved by Circumstances is punished as High Treason; for Mens Actions are governed by their Intentions. *5 Mod.*

A Conspiring or Compassing to *levy War* is not an overt Act, without a War levied *de facto*; but if a War be actually levied, the Conspirators are Traitors, altho' not in Arms.

And a Conspiracy to levy War 'tis said will be Evidence of an overt Act for compassing the King's Death. *3 Co. Inst.*

Not only such Persons as take up Arms against the King; but all who in a violent Manner withhold his lawful Authority, or attempt a Reformation of his Government, do levy War against him.

Those

Of Grounds and Principles. 7

Those that make an Insurrection to redress any publick Grievance, whether a real or pretended one, are said to levy War against the King, and to be guilty of Treason; though they have no Design against his Person. *Hawkins.*

So where great Numbers by Force endeavour to remove certain Persons from the King, or to lay violent Hands on a Privy Counsellor, or Magistrate for executing his Office; or to change Religion, or the Law, to cast down all Inclosures, &c.

But raising a Force to burn, or throw down a particular Inclosure, being a Grievance to Mens private Interest, is only a Riot.

Holding a Castle against the King's Forces, is a levying of War; and keeping together a great Number of armed Men, against the King's express Commands, has been held Treason. *Dyer.*

Persons who have joined with Rebels *pro timore mortis, & recesserunt quam citè potuerunt*, are not guilty of this Offence.

The *Adbering to the King's Enemies*, is proved by giving to such any Comfort or Relief, or being in Council with others to levy any seditious Wars.

To deliver or surrender up the King's Castles or Forts to an Enemy, for Reward, &c. is an Adherence to the King's Enemies, and High Treason. *Hale.*

It has been adjudged, that Adhering to the King's Enemies, is an Adherence against him.

And as Adhering to the Enemies of the King out of the Realm is Treason; one beyond Sea having solicited a Prince there to invade the Kingdom, was held guilty of High Treason, and triable by Statute 32 H. 8.

This may be inquired of and tried in the Court of King's Bench, or by special Commission in any County the King shall appoint; and the Adherence out of the Realm must be alledged in some Place in England. 3 Inst.

An Enemy coming hostilely into England, shall be dealt with as an Enemy, and executed by Martial Law, or ransomed; he cannot be arraigned for Treason, because he never was within the King's Allegiance. *Ibid.*

But

8 Of Grounds and Principles.

But a Subject of the King, assisting a foreign Enemy, shall be dealt with as a Traitor.

If on the King's Subject becoming a Rebel, one that is out of the Realm succours him, this is not an Adhering to an Enemy within the Statute of *Edw. 3.*

When one knows another has committed Treason, and does not reveal it to the King, or some Magistrate, that the Offender may be brought to Justice, by our ancient Law it is High Treason.

For the Delay in discovering the Treason, was judg'd an Assent to it: But now there must be an actual Assent to some outward act, to make concealing it Treason; or it will be only a *Misprision.* 1 & 2 P. & M.

A Person has Notice of a Meeting of Conspirators, goes into their Company, and hears their treasonable Consultation, and conceals it; this is Treason.

And so it is where one by Accident has been in such Company, and heard their Discourse, if he meets them a second Time; which shews an Approbation thereof. *Keling.*

Though if one is told in general, that there will be a Rising or Rebellion, and does not know the Persons concerned, or the Place where, &c. this may be concealed, and not be Treason or Misprision. *Hawkins.*

Violating the King's Wife, was High Treason at Common Law; because it destroy'd the Certainty of the King's Issue, and raised Contentions about the Succession to the Crown.

If the Queen consents, it is Treason in her; but this extends not to a Queen Dowager. The same Law of the Prince's Wife, to violate whom is only Treason during the Marriage; the eldest Daughter of the King is she that is then living and not married at the Time of the Violation.

And though there was an elder than her, who died without Issue; because now she has a Right to the Inheritance of the Crown, on Failure of the Issue Male.

3 Co. Inst.

Treason against the Life of the Queen, must be also during Coverture, and does not extend to a Dowager.

The

Of Grounds and Principles. 9

The Counterfeiting the Great Seal, or Privy Seal, must be an actual Counterfeiting; therefore an Intent or going about to counterfeit it, is no Treason.

And Affixing the Great Seal without Warrant, or taking off the Wax impressed from one Patent, and fixing it to another, or rasing any Thing out of a Patent and adding new Matter, are not a Counterfeiting and Treason within this Act, but a great Misprision. *Hale.*

Persons that aid and consent to the Counterfeiting the Great Seal, are equally guilty with the Actors.

Counterfeiting the Privy Signet, or Sign Manual, is not Treason within this Act, but made so by 1 & 2 P. & M.

Forging or Counterfeiting the King's Coin, is Treason by the Common Law and by Statute: The Counterfeiting, Clipping, and Filing Money, either of this Kingdom, or foreign Coin made current by Proclamation, is High Treason by 5 Eliz.

There arises no Corruption of Blood, or Loss of Dower, on committing this Treason, as there does in other Cases.

If any Person bring into the Realm Counterfeit Money, it is Treason within the Statute of Edw. 3. But then it must be according to the Similitude and Likeness of English Money, and brought from some foreign Realm, knowing it to be false, and be utter'd in Payment.

The bare forging of the King's Coin, without uttering, is Treason.

Also if Persons who have Authority from the King to coin Money make it of greater Alloy, or less Weight than they ought, it is said to be Treason. 3 Inst.

The making of any Stamp, or Die for Coining, except by Persons employed in the Mint, or conveying them from thence, is High Treason; and colouring Metal resembling Coin like Gold or Silver, or marking on the Edges, is likewise Treason by 8 & 9 W. 3.

Persons washing, gilding or colouring any Shilling or Sixpence, or altering the Impression, so as to make them resemble a Guinea or Half Guinea, are guilty of High Treason by the late Act 15 Geo. 2.

And those who tender in Payment any Counterfeit Coin knowingly, shall be imprisoned for a first Offence six Months,

TO Of Grounds and Principles.

Months, two Years for a second, and a third Offence is Felony.

Counterfeiting Copper Halfpence or Farthings is not Treason, but the Offenders are to be imprisoned two Years, and give Security for their Behaviour. *Ibid.*

A Reward of 40*l.* is given for apprehending Money-Coiners of Gold and Silver, by 6 & 7 *W. 3.* and 10*l.* Reward for Coiners of Copper-Money, &c. by this new Act.

Any Persons may cut or break Pieces of Silver Money suspected to be counterfeit, or unlawfully diminish'd; but if they prove good Coin, shall stand to the Loss. 9 & 10 *W. 3.*

The Treason in killing the Chancellor, Treasurer, or Justices of the Bench, &c. extends to these only when in the actual Execution of their Office, representing the King's Person; and only to a killing, not a wounding or attempting to kill, without Death. *Hale.*

But by Statute 3 *H. 7.* compassing to kill the King, or any of his Council, was made Felony.

And assaulting a Privy Counsellor executing his Office, and making any Attempt to kill him, is Felony by the 9 *Ann.*

Of other particular Treasons by Statute.

Persons refusing the Oath of Supremacy on the second Tender, were adjudg'd guilty of Treason, without Corruption of Blood, by 5 *Eliz.*

And absolving Subjects from Obedience to the King, or reconciling them to the See of Rome, is Treason in the Reconciler and Persons reconciled. 23 *E. I.*

Saying the King is a Papist, or he intends to introduce Popery, intending Death or bodily Harm, or a Restraint of the King's Person, &c. is High Treason, in case the Offenders express or declare their Intention, by Printing, Writing, Preaching, or malicious Speaking. 13 *Car. 2.*

Persons maliciously, by Writing or Printing, declaring that the King is not lawful King, or that the *Pretender* hath any Title to the Crown, are guilty of Treason.

And

Of Grounds and Principles. 17

And Preaching any such Doctrine, Teaching or advisedly Speaking, &c. incurs the Penalty of a *Præmunire*.

Also hindering any Person, who shall be next in Succession, from coming to the Crown, is made High Treason. 4 & 5 Ann.

But in every Case of Treason that relates to the King's Person there must be overt Acts of it; which are to be made appear by plain and sufficient Proof, and not by Conjectures.

The Offender must be lawfully attainted thereof, either by Confession, or by his Peers in his Life-time;

And therefore if a Person be Slain in open War, he shall forfeit Nothing, nor can he be attaint in such a Case, but by Parliament. Hale P. C.

Infants within the Age of Discretion, and Persons *non Compos Menti*, cannot be guilty of Treason; so that if a Traitor becomes *non Compos* before Conviction, he may not be arraigned, and if after, shall not be executed. *Ibid.*

A Person indicted for High Treason, is to have a Copy of his Indictment five Days before Trial, and shall be admitted to make a full Defence, by Counsel learned in the Law, and by lawful Witnesses, &c.

And there must be two Witnesses to the same overt Act, or two Acts of the same Treason, produced Face to Face, to make out the Treason against him. 7 W. 3.

All are Principals in High Treason; and on an Attainer of Treason, the Judgment in all Cases, except for Counterfeiting the Coin, is that,

The Offender shall be drawn on a Hurdle or Sledge to the Place of Execution,

And there be hang'd by the Neck, but cut down alive, his Bowels ript up, taken out and burnt before his Face;

His Head sever'd from his Body, his Body divided into four Quarters, and those be disposed of as the King thinks fit. Tho' where a Peer commits Treason, the King usually remits all but Beheading. 3 Co. Inst.

For Counterfeiting the King's Coin, the Offender is to be drawn and hang'd: And the Judgment in Petty Treason, is for a Man to be drawn and hanged; and for a Woman, to be drawn and burnt.

But

12 Of Grounds and Principles.

But Judgment for Murder and Felony, is for a Man or Woman to be hang'd by the Neck till dead ; and in extraordinary Cases of a Barbarous Murder, the Offender's Body is hang'd in Chains.

From these severe and dreadful Punishments, it is observed that the wicked fear to offend,

Oderunt peccare mali formidine poena.

Coke.

And though the highest Pain is, that such a Criminal shall be hanged until he be dead ; yet implicitly he is also punish'd in his Wife, that she shall lose her Dower ;

In his Children, that they shall become base and ignoble ; and he shall lose his Posterity, for his Blood is corrupted that they cannot inherit to him, or any other Ancestor :

And he shall forfeit all his Lands, Tenements and Hereditaments, and likewise all his Goods and Chattels.

2. The Crime of **Petty Treason**, by the Statute 25 Ed. 3. is where a Person out of Malice takes away the Life of a Subject to whom he owes special Obedience ; and may be in three Particulars,

As where a Servant out of Malice kills his Master ; or a Wife killeth her Husband ;

Or an Ecclesiastical Person, Secular or Regular, kills his Superior.

And this is called Petty Treason, in respect to High Treason, which is committed against the King.

In our Law this Crime implies the highest Degree of Murder ; and it's said that two Witnesses are required to find the Indictment for Petty Treason ; but not to the Trial of it, for 'tis not within the Act 7 W. 3. *Hawkins.*

The Aiders and Abettors, as well as the Procurors, are comprised within the Statute of Ed. 3. And whatever will make one guilty or Principal in Murder, shall make him so in Petty Treason.

But if the Servant does kill the Master upon a sudden falling out, or on *Se Defendendo*, it is not Petty Treason, but Manslaughter. *Hale P. C.*

If

Of Grounds and Principles. 13

If a Son kills his Father or Mother, though the Offence is most heinous, he shall not be tried for Petty Treason, unless he served his Father for Wages, &c. and then he shall be indicted by the Name of a Servant.

This is because the Son is not within the Meaning of the Words of this Act; yet where a Servant kills his Mistress, or his Master's Wife, she is Master within the Letter of the Statute. 3 Co. Inst.

In Case the Servant or Wife are of Confederacy to kill the Husband or Master, and be in the same House, though not in the same Room, they are Principals and guilty of Petty Treason; for by Law they will be judg'd present. Crompt.

A married Woman and another Person kills the Husband, here the Wife is deemed guilty of Petty Treason, and the other of Murder.

Though if a Wife and her Servant conspire to kill the Husband, for which they appoint Time and Place, but the Servant alone in the Wife's Absence killeth him, this shall be Petty Treason in both. Moor.

The Lord Dyer in his Reports, says thus of Petty Treason:

If a Servant Slay his Master by the Procurement of the Wife, though the Wife be absent it is Petty Treason in her as well as the Servant, because it was Petty Treason in the Principal; but if the Murder by her Procurement were done by a Stranger in her Absence, it is but Murder in her, it not being Petty Treason in the Stranger. If the Master be murdered by a Stranger, by the Procurement and in the Presence of his Wife or Servant, it is Petty Treason in Them, and Murder in the Stranger, because all Principals.

3. The next Crime is **Murder**; which is a wilful and felonious Killing of another, upon Malice forethought.

This Offence may be committed in divers Ways;

As by Weapon, Crushing or Bruising;

By Shooting, Smothering or Poisoning;

And by Strangling, Starving, &c.

But the Person wounded or hurt must die within a Year and a Day after the Fact committed, or the Law will presume he died a natural Death.

14 Of Grounds and Principles.

If in that Time the Party dies, altho' it be by disorderly Living, the Wound, or other Injury, will be judged the principal Cause of his Death, to make it Murder. *3 Inst.*

In the Case of Stabbing another, if any one stab a Person who hath not at that Time any Weapon drawn, or hath not first stricken, the Party which stabs is guilty of Murder, if the Person die within six Months after; by Statute *Jac. 1.*

Though where a Man that is *non Compos* kills another Person, this is not Murder: 'Tis the same of a Lunatic during his Lunacy. But he that incites a Madman to kill a Person, is a principal Murderer.

And if one that is drunk killeth another, it is Felony and Murder by our Law. *Hale.*

A Person under the Age of Discretion kills a Man, it is not Felony; though if by Circumstances it appears an Infant under twelve Years old could distinguish Good and Evil, and knew what he did; if he kill another, it may be Murder: As if he hide the dead Body, make Excuses, &c.

It is not the bare Killing, but *Malice*, that makes the Crime of Murder; and the Malice must be of Corporal Damage to the Party; and if it be not continuing till the Death, 'tis no Murder. *Hale P. C.*

This Malice is either expressed, or it is implied.

The express Malice, is when 'tis evidently proved there was some ill Will or old Grudge before the Killing, and the Fact was committed with a Sedate Mind, and a formed Design of doing it.

And implied is, where a Person kills another having nothing to defend himself; as in going along a Street, over a Stile, or the like.

If a Killing or Murder be perpetrated through a direct Purpose to act some personal Injury to the Person Slain, it is said to be properly of express Malice. *Kelyng.*

As where a Man in cool Blood, maliciously and deliberately beats another in such a Manner, beyond any appearing Design of Chastisement, that he dies:

Of Grounds and Principles. 15

In that Case it is Murder, by express Malice, tho' he did not intend to kill him;

For if a Person voluntarily commits any violent or cruel Act, which is attended by Death, in Judgment of Law he is looked upon to do it of Malice aforethought.

And where one executes his Revenge in a cruel Manner, with a dangerous Weapon, as shews a malicious Design of doing Mischief, and Death ensues thereon, it is express Malice and Murder from the very Nature of the Fact. *Kel.*

By Poisoning a Person; and where a Man killeth another without Provocation, Malice is plainly implied. If one resolves to kill the first Person he meets, and kills him accordingly, it is Murder, tho' he knew him not, for here Malice is implied against all Mankind.

One lays Poison to kill a certain Person, and another takes it and dies, it is Murder: It would be otherwise, if laid to kill Rats.

And if *A.* bearing Malice to *B.* strikes or shoots at him, but misseth him and kills *C.* this will be Murder in *A.* and if it were without *Malice prepense*, then Manslaughter. *Dyer.*

In such Case the Malice intended to one, makes the Death of another upon that Malice, Murder, and qualifies the Act as if it had its due Effect.

If a Man does a Thing that apparently must introduce Harm; as where he runs among a Multitude of People with a Horse used to strike, &c. and one is killed, it is Murder, if done with an Intent to do Harm.

For an Intention of Evil, tho' not against a particular Person, makes a Malice, and the Fact thereon is Murder. *Hale.*

A Person finds a Boy stealing Wood; he bound him to his Horse-Tail, the Horse ran away with him, and killed the Child, it was adjug'd Murder.

The Causing an Abortion, by giving a Potion to, or striking a Woman big with Child; was formerly Murder; but now a great Misprision only, unless such Child be born alive, and die of the Bruise. *Hawkins.*

Where

16 Of Grounds and Principles.

Where the Death of a Bastard, newly born, is concealed, it shall be supposed to have been murdered; except the Mother proved it Born dead. 21 Jac. 1.

If an Infant be laid under Leaves or Trees, and suffered to be destroyed by Vermin; or a Sick Man in the Cold, whereof he dies, either are a Killing. 3 Inst.

Of Murder by Combat and Duelling, &c.

In Case two Persons fight in cool Blood, on a former Quarrel, and one of them is killed; and where upon a sudden falling out, one appears to be Master of his Temper, and kills another, it will be Murder. *Plowden.*

For where there is a Fighting between two, on such precedent Quarrel, it may be presumed to be on Malice prepensed.

And tho' two Persons fall out early in the Morning, and meet in the Afternoon of the same Day, if one be killed, it is Murder; for their after Meeting is of Malice.

Hawkins.

But if *A.* and *B.* are at Malice, and reconciled, and after upon a new Occasion, they fall out, and *B.* is killed, it is held to be no Murder.

So it is, where they combat on Malice, and being parted, afterwards they meet and fight upon a sudden, and one kills the other; by some 'tis not Murder, because the first Malice is satisfied. *Hale.*

Yet if the Party killed, in the first Combat had wounded the Party slaying, it might be otherwise.

If there be a Quarrel between two Persons, and one challenges the other, who declines meeting him, but at length upon Importunity, and to vindicate his Reputation, meets and fights, and kills the Challenger, it is Murder. *Kelyng.*

Tho' here if the Person challenged refuse to meet, and saith he shall go To-morrow to such a Town, and being assaulted by the Way, he kills the Challenger, 'tis Manslaughter only.

Where

Where two Persons *A.* and *B.* fall out, and on a Challenge they appoint the Field, and each takes his Second with him; if *A.* kills *B.* this is certainly Murder in *A.*'s Second; and it hath been also adjudg'd Murder in the other Second. But this last seems otherwise according to *Hale*.

'Tis said by some, that the Seconds of the Person killed, are equally guilty of Murder, by Reason of the Encouragement which they gave by joining with him. *Hawkins*.

A. and *B.* falling out on a sudden, they presently agree to fight, and each fetches a Weapon, then they go into the Field, and one kills the other, this is only Manslaughter, because the Blood never cooled.

'Tis otherwise, if they appoint to fight the next Day, or at any other Time.

If there be Malice between *A.* and *B.* and upon that Malice they meet and fight; here tho' *A.* gives the first Blow, yet if *B.* kill him, it will be Murder. *Hale*.

In the Common Law it is of no Signification who begins the Quarrel, or gives the first Stroke: And no Words, tho' ever so reproachful, are a sufficient Provocation to extenuate the Crime of Murder;

But if angry Words pass between two Persons, and one pulls the other by the Nose, whereupon the Person assaulted kills him immediately, it is but Manslaughter, from such a sudden Quarrel.

If a Man provoked by Words or Gestures, makes a Push at a Person before his Sword is drawn, and a Fight ensues, wherein he who made the Assault kills the other, it is Murder:

Here in Case he had made no Push till the other's Sword was drawn, it would have been only Manslaughter in the Person killing.

A Person assaults another with Malice, tho' he be afterwards driven by the other to the Wall, and there he kills him in his own Defence, 'tis Murder by Reason of his first Intent.

In this Case if the Party assaulted fly to the Wall, and being still pursued, he kill the other, it is only Manslaughter. *Kelyng.* Two

18 Of Grounds and Principles.

Two having Malice prepense fight, and the Servant of one of them not acquainted with the Malice, takes Part with his Master, and kills the other ; this is Murder in the Master, and but Manslaughter in the Servant :

But when there is a Conspiracy to kill a Man, but no Malice against his Servant, if the Servant be slain, the Malice against the Master shall be judg'd to extend to his Servant, the Killing of whom is Murder. *Dyer.*

If two or more come together to kill, rob or beat a Man, or to commit a Riot, and one of them kills a Person, it is Murder in all those of that Party that are present, aiding or abetting thereto, or that were ready to aid him, tho' but Lookers on ;

All will be said to intend the Murder ; but it is otherwise if the Lookers on came there by Chance. *Dalton.*

If Offenders come into a Park, and the Park-Keeper shoots at them, whereupon they fly, but he pursues, and they kill him, it is Murder in all ; for their first Entry was with a malicious Intent.

In Robbing a Park and committing Murder, all are held to be present that are in the same Park, though half a Mile distant and out of View.

If any Person stand by and encourage another to slay a Man ; or where one comes with others on Purpose to kill him, and stands by till the Fact is done, 'tis Murder in all present. *Plowden.*

Killing a Person endeavouring to part others fighting, though without any evil Intention against him, is Murder.

And where two Men are fighting, if other Persons looking on do not endeavour to part them ; or to apprehend the Murderer, if one be killed, they may be indicted and fined. *Noy.*

Where any Magistrate or Minister of Justice in the Execution of his Office, Sheriff, Constable, or Watchman in doing his Duty, or any one that comes in Assistance of the King's Officers is killed, it is Murder.

And here a Person shall not be excused, by alledging that what he did was in a sudden Affray, &c.

If a Bailiff is killed, in executing a Writ or Process, or a lawful Warrant, tho' the Process be erroneous, or

he

Of Grounds and Principles. 19

he do not produce his Warrant, if he be a Bailiff commonly known, it will be Murder;

But here if the Officer doth that which is unwarrantable, as if he break open the Door of a House, or Window, to arrest a Person in a Civil Case; or if he arrests a wrong Person, or one upon a *Sunday*, &c. these Acts are unlawful, and it is no Murder, but only Manslaughter to kill him. *Croke James.*

Of Killing not Murder, but Justifiable.

If a Man, without any Provocation, is assaulted anywhere by another, in such a Manner that it plainly shews an Intent to Murder him, as by passing at him with a Drawn Sword, &c. he may justify killing such Assailant. *Penlow.*

Where one attempts to commit Murder, Robbery, or other Felony, a Man or any of his Servants may lawfully kill him.

And where a Person in Possession of a Room in a Publick House, kills another attempting to turn him out of it; the Killing has been held to be justifiable. *2 Inst.*

Likewise if a Woman kills a Man, who attempts to commit a Rape upon her, she may justify the doing it.

Trespassers in Forests, &c. not surrendring, but defending themselves, and Rioters standing in Opposition to Justice's Command, the killing them is justifiable.

So if a Felon will not suffer himself to be arrested, or he flies for it, being pursued upon a Hue and Cry; or where a Prisoner assaults those as conduct him to Gaol, his Gaoler in endeavouring to escape, &c. killing such may be justified. *3 Co. Inst.*

But this is only when an Offender cannot be taken or secured without Killing.

And if a Prisoner by Durels of the Gaoler comes to an untimely End, it will be Murder. *Hale.*

There is a Killing excusable, where a Man kills another *ex Necessitate*, merely in his own Defence. See *Sendendo.*

20 Of Grounds and Principles.

4. The Crime of Manslaughter; which is where a Person is killed upon a sudden falling out, without Malice.

Or it is when one commits a voluntary and unlawful Act, but without any deliberate Intention to do it: And for this Crime, the Offender shall have the Benefit of Clergy for the first Offence.

Where two suddenly fall out and fight, and one breaks his Sword, on which a Stander-by lends him another, wherewith the Adversary is killed, it is Manslaughter in both the Killer and the Stranger.

And if a Man in Vindication of his Friend, who is assaulted by another, presently takes up an Instrument, and kills the other, such Act is Manslaughter. 1 Hawk.

If a Man is taken in Adultery with another Person's Wife, and the Husband presently kills the Adulterer; this is a great Provocation, and makes it but Manslaughter.

Two Persons strive for the Wall in a Street, and one kills the other, it is Manslaughter; and so it is if two play at Foils, and one kill the other. Hale.

A Man shoots off a Gun in a City, or Highway, which endangers the Life of some Person, and one is killed, it is Manslaughter by our Common Law.

And if one throw Stones over a Wall, in a Place where Persons often resort, or at another in Play, and kill any Person; if it be done without any evil Intention, it is Manslaughter.

It is not Murder, because there is no malicious Intention to hurt; nor *per infortunium*, as he was doing an unlawful Act.

Where a Person shooting at the tame Fowl of another which is an unlawful Act, kills a Stander-by, it is said to be Murder in such Person.

If he shoot at a wild Fowl, Hare, &c. and be not qualified to keep a Gun, or kill Game, and kills any Person, 'tis Manslaughter.

And if he is qualified to keep a Gun, which make the intended Act lawful, it is only Chancemedley. 3 Inst.

Of killing Persons, Chancemedley, and Se
Defendendo, &c.

As to *Chancemedley*, it is where a Man is doing a lawful Act, without any Intent of Hurt to another, and one is casually killed thereby.

This may be in divers Instances; as where a Person casts a Stone, or shoots an Arrow in the Fields, or other open Place, and they happen to strike and wound a Man, of which he dies.

If one be cutting down a Tree, and the Hatchet-head flies off, and kills a Person; or where he is doing a lawful Thing that may cause Danger, and gives Warning, after which a Man is killed; these accidental Killings are *Chancemedley*. *Hale*.

So it also is, where a Master in correcting his Servant, or a Schoolmaster his Scholar, or an Officer whipping a Criminal, in a reasonable Manner, happens to occasion their Death.

It is likewise called Manslaughter by *Misadventure*, for which the Offender shall have his Pardon of course.

Se Defendendo, is where one kills another in his own Defence, being under an inevitable Necessity of doing what he did.

And any Person, in his just Defence, may kill others for the Safety of his Life; but if Malice be coloured under a Pretence of Necessity, or one kill another before he need to do it, it may be Murder, or Manslaughter. *Staunford P. C.*

If a Person on some sudden falling out be attacked, and before a mortal Wound is given he flies to the Wall, or other unpassable Place, as far as he can, to save himself, but being still pursued kills the Aggressor; this is *Se Defendendo*.

In this *Homicide* the Party assaulted is not excused, unless he give back to the Wall.

But if the Assault be so fierce and violent, and in such
B 2 a Place,

22 Of Grounds and Principles.

a Place, that giving back would endanger his Life, then he need not give back, to excuse the Defence. *Hale.*

If *A.* assaults *B.* upon Malice, who retreats to the Wall, and then in his own Defence kills *A.* here, if it be in the Highway, he shall be discharged; but if not, 'tis *Se Defendendo.*

Though in case *A.* retreat back to the Wall, and there kill *B.* it is Murder.

A Man that kills another by Misadventure, has of course his Pardon: But if a Person be only wounded, an Action of *Trespass* may be brought; and he shall have the same Judgment as if done of Malice.

For in that Case the Law takes Notice of the Damage of the Party wronged, and not of the malicious Intent, as in Capital Cases. *Bacon.*

Felo de se, in our Law, is where a Man lays violent Hands on and kills himself.

As in Cases of Murder, the Death must ensue within a Year and Day after the Stroke, &c. The Act must be deliberate, and purposely done; and the Person that commits it, must be of the Age of Discretion, and *Compos Mentis*, or it will not be Felony.

Therefore if a Lunatic, during his Lunacy, one distracted by a Disease, an Ideot, or Infant kill himself, neither of these are *Felo de se*. 3 *Inst.*

A Man that persuades another to kill him, does not come under this Name; his Assent being void in Law, and the Person killing him judg'd a Murderer.

Yet it is *Felo de se*, where one maliciously endeavouring to kill another, falls upon his own Sword, whereby he kills himself; but here he is to be the only Agent. *Kelway.*

On a Verdict found of *Felo de se* before the Coroner, the Offender forfeits all his Goods and Chattels to the King, for the Loss of a Subject and Breach of the Peace: And by Custom the Body is buried in the Highway, &c.

But the Forfeiture is often saved, by the Jury's favourable finding the Fact to be Lunacy. *Hawkins.*

There is a *Maihem* or Maiming, that is Felony by our Law.

Of Grounds and Principles. 23

As where any Person on Malice forethought, and lying in wait, cuts off the Nose, puts out the Eye, disables the Tongue, or cuts off or disables any Limb or Member of another, with Intent to maim or disfigure him.

The Offender, his Aiders and Abettors, &c. are deem'd guilty of Felony, without Benefit of Clergy; but no such Attainder shall corrupt the Blood, &c. 22 & 23 Car. 2.

In these Cases a voluntary Act the Law judges to be done out of Malice; as where one kills a Person without Provocation.

If a Man maim or disable himself, 'tis said, he may be indicted and fined for it at the King's Suit.

5. The Crime of **Felony**, was formerly every Capital Offence, done with an evil Intention, and a bitter or fierce Mind.

Now we account any Offence to be Felony, that is in Degree next to Petit Treason.

It is either by the *Common Law*, by the *Civil Law*, or by *Statute*.

The Felony at Common Law is against the Life of a Person, as Murder, Manslaughter, *Felo de se*, &c. or against a Man's Goods, such as Larceny and Robbery; against his Habitation, as Burglary, Arson or House-burning; and against public Justice, by Breach of Prison, &c. 3 Inst.

Piracy, or Murder on the Sea, is Felony according to the Civil Law, and also by our Statutes.

And the Felonies by Statute are many, and increasing.

There are in general two Sorts of Felonies; the one lighter, such as for the first Offence may be allowed the Benefit of Clergy; but the other, the greater, may not: Though Clergy is granted, where it is not expressly taken away by any Statute. *Hawkins*.

Felony excluded Clergy is punishable with **Loss of Life**, and of Lands not intailed, Goods and Chattels; and it commonly works Corruption of Blood, except a Statute making an Offence Felony, ordains it to be otherwise.

24 Of Grounds and Principles.

And concerning Felonies, where a Person steals another's Goods, not from his Person, or out of his House by Night, it is called *Larceny*; and if the Thing stolen exceeds 12*d.* Value, 'tis Grand Larceny, for which the Offender shall be hanged.

But when the Theft is under that Value, it is termed Petit Larceny, and is punished with Whipping: And the Jury may find the Goods of less Value, though a Man be indicted of stealing Things worth 40*s.* and so convict the Prisoner but of Petit Larceny.

Not only if one steal the Goods of another, it is Felony; but if a third Person feloniously takes them from him, such third Person is a Felon as to both the others.

Stealing of Goods, which Persons by Contract are to use; or where a Guest steals Plate set before him at an Inn or Tavern; either of these are Felony: Those that have the Charge of Things, as of a Chamber, &c. may be also guilty of Larceny. *Raym.*

In Case a Shopkeeper delivers Goods to one, who pretends to buy them, and he runs away with the Things, it is Felony: But if a Horse be lent to a Man to go to a certain Place, and he goes further, and then rides away with the Horse, 'tis not Larceny, because he had at first a lawful Possession. *Dalton.*

And yet if a Carrier, after he hath brought Goods to the Place appointed, take them away privately, 'tis Felony; for the Possession which he had from the Owner being determined, he is as a meer Stranger. It is the same if he carry the Things to some other Place than that agreed. *3 Inst.*

Where a Taylor employed to make a Suit of Clothes imbezils the Cloth delivered to him for that Purpose, it is no Felony: Nor is it so where a Servant goes away with his Master's Goods, delivered him, which is only Breach of Trust.

This is by reason of the Delivery; but by Statute, they are to be under 40*s.* Value. *Dalt.*

A married Woman cannot be guilty of Felony in stealing her Husband's Goods; though if she deliver them to an Adulterer, it is Felony in him to receive them.

And

Of Grounds and Principles. 25

And if a Feme Covert commits Felony in Company with her Husband, it shall be presumed to be done by his Command and Coercion, and she will be excused.

But 'tis otherwise where the Wife steals Goods alone, without the Knowledge of the Husband, there it is Felony in her.

In felonious Attempts, the least removing a Thing, altho' it be not quite carried off, is Felony; as where one takes Things out of a Box, and lays them on the Floor, but is apprehended before he gets away. *&c. Hale.*

To steal Dogs, *&c.* which are of a base Nature, is not Felony; nor Deer, Hares, *&c.* except they are made tame: If any Poultry, or Fish in a Trunk, are taken away, 'tis Felony. *3 Co. Inst.*

Of particular Felonies by the Statutes.

Armour of the King's, imbeziling to the Value of 20 s. Felony. 31 Eliz.

Bail acknowledging in the Name of another, not privy or consenting. 21 Jac. 1.

Bankrupts not surrendring themselves, or not discovering their Estates; or removing any Money or Effects to 20 l. Value. 5 Geo. 2.

*Bills or Bonds, and Notes, *&c.* for Money, stealing of. 2 Geo. 2.*

Buggery with Man or Beast. 25 H. 8.

*Burning Houses, Barns, or Stacks of Corn, *&c. 22 Car. 2.**

Cattle destroying, to suffer as in Cases of Felony. 22 Car. 2.

*Custom Officers obstructing, where three or more are assembled with Fire-Arms, *&c.* to assist in running Goods. 9 Geo. 2. and not surrendring themselves pursuant to Notice in the Gazette, *&c. 19 Geo. 2. c. 34.**

Deeds inrolled acknowledging in others Names, without their Privity. 21 Jac.

*Fines of Lands also acknowledging in Name of another Person. *Ibid.**

26 Of Grounds and Principles.

Forgery of a Deed, Will, Bond or Writing ; or of any Bank Note, Exchequer Bill, Lottery Ticket or Order ; or altering the Number or Principal Sum of any Order, &c. 7 & 8 W. 3. 9 Ann. 8 Geo. 1. 2 Geo. 2. Forging Bills of Exchange. 7 Geo. 2.

Hop-binds growing on Poles, maliciously cutting down. 6 Geo. 2.

Horse stealing, and destroying them in the Night. 22 & 23 Car. 2.

House Robbery, or stealing Goods from any House, Shop, Outhouse, &c. to the Value of 5s. 10 & 11 W. 3. And the stealing Lead from Houses, by 4 Geo. 2.

Hunting Deer in Forests, &c. by Persons armed and having their Faces blacked or disguised, or shooting at any one, or sending any threatening Letter to another, demanding Money or other valuable Thing. 9 Geo. 1.

Judgments acknowledging or confessing in another Person's Name. 21 Jac.

Linen Stealing and taking away from Whitening-Grounds, or Drying Houses, &c. of 10s. Value, and those who knowingly buy or receive it. 4 Geo. 2. 18 Geo. 2. c. 27.

Maiming or cutting off any Limb or Member of a Person maliciously, so as to disable him. 22 & 23 Car. 2.

Marrying a second Wife or Husband, the first living, unless absent abroad seven Years, without Notice of being alive ; and stealing any Heiress, or a Woman that has Lands or Goods. 3 H. 7. and 1 Jac. 1.

Mines of Coal maliciously setting on Fire. 10 Geo. 2.

Navigable Rivers, &c. breaking down the Locks, Sluices, or other Works thereof. 8 Geo. 2.

Pickpockets taking above 12d. from the Person of another ~~clam & secrete~~, without his Knowledge. 8 Eliz.

Pirates assisting, advising, concealing or Trading with, &c. 11 & 12 W. 3. 18 Geo. 2. c. 30.

Priests and Jesuits Persons receiving and relieving knowingly. 27 Eliz.

Privy Counsellor, Persons assaulting in the Execution of his Office. 9 Ann.

Rape

Of Grounds and Principles. 27

Rape of Women, or carnally knowing any Maid under ten Years old, tho' she consent to it. 18 *Eliz.*

Recognizance, or Statute, acknowledging in the Name of another. 21 *Jac.* 1.

Records imbezilling, by an old Statute. 8 *H.* 6.

Recovery of Lands, &c. suffering or passing in another's Name, not privy and consenting thereto. 21 *Jac.*

Rioters assembled to the Number of twelve; if they do not disperse within an Hour after Proclamation made for that Purpose. 1 *Geo.* 1.

Robbery of Churches or Sacrilege; and Robbery on the Highway, or assaulting Persons forcibly, with Intent to rob them. 13 *Ed.* 1. 7 *Geo.* 1.

Servants purloining or imbezilling the Goods of their Masters to the Value of 40*s.* and above. 12 *Ann.*

Sheep driving away, or otherwise Stealing, or Killing, with an Intent to steal their Carcasses, or any Part thereof. 14 *Geo.* 2.

Ships at Sea wilfully casting away, or making Holes in the Bottom or Sides, tending to their Loss. 12 *Ann.*

Soldiers departing from their Colours, without Licence; or Subjects inlisting themselves to serve any foreign Prince. 18 *H.* 6. 9 *Geo.* 2.

Stolen Goods receiving knowingly from Felons; and Thief-takers taking a Reward for helping others to such Goods, and not prosecuting the Felon. 6 *W.* 3. 4 *Geo.* 1.

Turnpikes pulling up and destroying, or the Gates, Posts or Rails. 8 *Geo.* 2.

Watermen taking into their Boats a greater Number of Passengers than allowed by Law, where a Person is drowned thereby. 10 *Geo.* 2.

Woollen Cloth stealing from the Tenters in the Night-time. 22 *Car.* 2.

Wood or Underwood setting on Fire, or burning maliciously. 1 *Geo.* 1.

All the *above Cases* are made Felony by Statutes; but by some thereof, the Offenders are only subject to Transportation.

And Persons convicted of Felony, within the Benefit of Clergy, may be ordered by the Court to be trans-

28 Of Grounds and Principles.

ported to the Plantations for seven Years, instead of being burnt in the Hand or whipped.

Also for Felony excluded Clergy the Offenders may be pardon'd, and Transported for fourteen Years, by 4 Geo. 1.

But returning before the End of the Time limited, such Felons shall suffer Death. 6 Geo. 1.

A Felon refusing to put himself upon his Trial, and to plead, shall undergo the Penance of *Peine fort & dure*, and be pressed to Death; but if he stand mute by the Act of God, it shall be inquired of, &c.

Of Accessaries to Felony.

An Accessary is where a Person is guilty of some felonious Offence, but not principally concerned, tho' he is a Partaker in the Crime.

An Accessary before the Fact, is he that advises, commands or procures another to commit Felony, and is absent when done; for if he be present, he is a Principal.

The Accessary after the Fact, is one who receives, assists or comforts a Man, whom he knows to have committed Felony or Murder. *Hale P. C.*

If one commands another to beat a Person, and he beats him so that he dies, the Person commanding shall be accessary to the Murder: And in Case *A.* commands *B.* to kill *C.* with a Gun, who kills him with a Sword, *A.* is Accessary, because the Killing was the Substance.

But here in this Case, if *B.* by Mistake kill *D.* it is Murder in *B.* but *A.* is not accessary thereto.

And where a Person commands another that he steal a Black Horse, and he steals a White one, &c. or if the Command be revoked, the Commander shall not be Accessary. *Plowden.*

One that is present and aiding to the Stabbing of another, is but an Accessary within the Act 1 *Jac. 1.* And there cannot be an Accessary before the Fact in Manslaughter, by Reason it is done of a sudden, and not premeditated.

A Woman

Of Grounds and Principles. 29

A Woman that receives or assists her Husband, is not Accessary; but a Husband receiving his Wife, makes him an Accessary to her Offence: A Brother receiving his Brother may be accessary; so a Servant relieving his Master, &c.

The furnishing others with Weapons; finding a Felon a Horse for his Journey, or relieving him with Money, or Victuals, knowing him to be a Felon, will make Persons accessary. 3 Inst.

If the Owner of Things stolen, after Complaint to a Justice, take his Goods, and consent to the Escape of the Felon, or compound the Offence, 'tis said he may be accessary after the Fact.

Tho' it is otherwise if done before such Complaint made. *Lambard.*

Accessaries before the Fact in Petit Treason, Murder, Robbery on the Highway, Burglary, &c. shall not have their Clergy. 4 & 5 P. & M.

Receiving an Accessary to a Felony, makes one Accessary of an Accessary. *Hale.*

6. The Crime of **Robbery on the Highway**, is a felonious and violent taking away of Money or Goods from the Person of another, on the Highway, thereby putting him in Fear.

It is Felony without Benefit of Clergy, tho' the Sum or Value taken be under Twelve pence, or but a single Penny; but by the Common Law something must be taken.

And if any Thing is taken from another's Person, without putting in Fear, which distinguishes this Crime, 'tis properly no Robbery, but Felony, wherein Clergy is allowed. 3 Inst.

There is both a Taking in Deed, being the very Act, and in Law; as where a Robber compels a Man for Fear of Death, to swear he will bring him a Sum of Money, which he delivers to the other; this is a Taking, and Robbery.

If a Robber bids a Person on the Highway deliver his Money, tho' it be either with or without Weapon drawn, and

30 Of Grounds and Principles.

and the Person gives it him, it is a felonious Taking to make this Crime.

And where one with a Pistol in his Hand, demands Money of another, if afterwards he prays Alms, and the same be given accordingly, it is a Robbery ; being accompanied with Circumstances of Terror, that cause the Person to part with his Money. *Hawkins.*

A Man pursued by a Highwayman, endeavours to make his Escape, but lets fall his Purse, &c. which the Robber takes up, this is a Taking from his Person.

'Tis the same, tho' in striving he lets the Bag or Purse fall again, and leaves it there ; or if finding little therein, he delivers it with all the Money again to the Party ; because the Offender had the Thing in his Possession, and Continuance is not required. *Hale.*

To take Goods from a Servant, in Sight of his Master, is adjudg'd a Robbery of the Master ; and taking away a Person's Horse standing by him, or of any Thing belonging to him, in his Presence, and against his Will, is Robbery.

For the taking a Thing in the Presence, is in Law a Taking from the Person.

But if one leaves his Horse tied to a Gate, and steps aside ; or if a Carrier follows his Horses at a Distance, and they are taken away, this is not such a Taking to be Robbery. *Dalton.*

All that come in Company to rob, being in the same Highway, are Principals, altho' one only actually do it ; and tho' he rides away from the rest of the Gang, and commits the Robbery without their Knowledge.

Every one shall be esteemed to take the Money, because they came together with an Intent to rob some Person, and to assist each other. *Cromp.*

There is a Reward given by Statute of 40*l.* for apprehending and prosecuting a Robber on the Highway, so as the Party convict him, to be received of the Sheriff of the County, on producing a Certificate of the Judge of his Conviction ; with the Offender's Horse, Furniture, &c.

Also

Of Grounds and Principles. 31

Also if an Offender out of Prison, having committed a Robbery, will discover two or more of his Accomplices, he shall be intitled to a Pardon. 4 & 5 W. & M.

The Hundred wherein Robberies are committed, are liable to answere the Money, when done on the Highway, and in the Day-time of any Day, except Sunday, in Case the Robbers are not taken in forty Days.

But Notice is to be immediately given of a Robbery to some of the Inhabitants near the Place, that the Constables may make Hue and Cry and Pursuit with Horsemen and Footmen after the Robber. 27 Eliz.

This Pursuit is to be made from Parish to Parish, until the Offender is apprehended, or at least thus pursued to the Sea-fide; and the Constables and others may search all suspected Houses and Places, and arrest Persons as they find suspicioius, and carry them before a Justice, &c.

If any of the Robbers are apprehended within the forty Days limited, the Hundred is discharged; if not, the Person robbed is to make Oath before some Justice of Peace of the County of the Time and Place of the Robbery, and of what he was robbed, and that he knew none of the Robbers.

After this, in twenty Days, he may bring his Writ or Action against the Hundred, but the Process is to be served on the High Constable, who shall appear thereto, and defend the Action.

By a late Statute, Notice must now be inserted in the Gazette, describing the Robber, and Circumstances of the Robbery.

And in case a Receiver General of Taxes be robbed, there must be three in Company to make Oath of such Robbery, to maintain an Action against the Hundred. 6 Geo. 1. and 8 Geo. 2.

7. The Crime of Burglary, is where a Person in the Night-time, breaks and enters into the Mansion-House of another, to the Intent to commit Felony within the same.

And it is Burglary whether the felonious Intention be executed or not.

The

32 Of Grounds and Principles.

The like Offence committed by Day, is called *House-Breaking*, to distinguish it from Burglary.

Burglary may be committed in a Mansion House, though all Persons are out upon Occasion: So if a Man hath two Houses, and lives sometimes in one, and sometimes in the other; if the House he does not inhabit is broken by any Person in the Night, 'tis Burglary.

A Shop and Out-buildings adjoining, are Parcel of a House; and Chambers in an Inn of Court; or where Part of the House is divided from the rest, with a Door to the Street, either of these is Mansion; and it is Burglary to break it. *Hale P. C.*

In some Cases there may be Burglary without actual Breaking a House; as where Thieves pretend Busines to get in by Night, and the Owner of the House opens his Door, and then they come in and rob the House, this will be Burglary in the Offenders.

If a Criminal doth not break the House, but is within and steals Goods, and after opens the House on the Inside, and goes out with the Goods; or if one comes down a Chimney to rob the House, &c. it will be Burglary. *Kelyng.*

Where a Person unlocks any Door, or gets into any House by the Help of a Key; or where a Thief breaks the Glass of Windows, or makes a Hole in the Wall, &c. in order to steal, it is a Breaking of the House.

And setting a Foot over the Threshold, putting a Hand, Hook or Pistol within the Window, or Door, is an Entry in Law to make it Burglary.

But if a Door be open, or Hole made in the Wall before, and the Thief enters and steals, or draws out Goods, this is not Burglary by the Common Law.

In Case a Servant draws the Latch of his Master's Chamber, in the Night, to rob him, 'tis a Breaking; and if he opens the Window to let in a Thief, who comes in and takes Things, it is Burglary in the Stranger, and Robbery in the Servant. *3 Inst.*

Robbery in a Booth or Tent, in a Fair or Market, the Owner being within the same, is punish'd as Burglary, by Statute 5 & 6 Ed. 6.

And

Of Grounds and Principles. 33

And taking away Goods from a Dwelling-House, &c. of 5*s.* Value, altho' there be not any Breaking, in either Night, or the Day, is Burglary and Felony, and excluded the Benefit of Clergy. 3 & 4 W. & M.

Also the Reward of 40*l.* is given for apprehending a Burglar, and prosecuting him to Conviction, &c. 5 Ann.

8. The Crime of Rape; which is where a Man hath an unlawful and carnal Knowledge of a Woman, by Force and against her Will.

'Tis a violent Deflouring her, whether she be young or old, which Offence is Felony without Benefit of Clergy, both by the Common and Statute Law. 1 Inst.

It is ordained by the 18 Eliz. that whosoever shall carnally know any Woman Child that is under ten Years of Age, he shall suffer as a Felon: And here it doth not signify whether such Child consented, or were forced; but it must be proved the Offender enter'd her Body, &c. Dalton.

There is to be an actual *Penetration* and *Emission* to make this Crime; and if there be neither of these, an Attempt to ravish, be it never so outrageous, is deemed only an Assault.

In Case of a Rape committed, it is no Excuse or Mitigation of the Ravisher's Offence, that the Woman at last yielded to the Violence, and consented, either after the Act or before, if such her Consent was forced by fear of Death or Imprisonment.

Or that a Woman was a common Strumpet, who is nevertheless under the Protection of the Law, and may be injured in her Body.

But it is said by some Authors to be Evidence of a Woman's Consent, that she was a common Whore.

And 'tis a strong Presumption against any Woman, that she made no Complaint in a reasonable Time after the Injury; for which our antient Laws mention forty Days.

If she conceals the Fact for any long Time, it may argue a Consent. *Hawkins.*

A Woman ravished may prosecute, and is allowed to be a Witness in her own Case: But the Woman's positive Oath of a Rape, without concurring Circumstances

34 Of Grounds and Principles.

of the Fact, and Signs of the Injury received, is seldom credited.

Because says *Hale*, there are divers Instances of Rapes that have been fully proved, but were afterwards discovered to be malicious Contrivances. *Hale Hist. P. C.*

If the Man can prove that he was at another Place, or in another Company, at the Time she charges him with the Offence, this will invalidate her Oath; so it is if she be wrong in the Description of the Place where done.

Or when she swears the Fact to be committed where it was impossible he could have Access at that Time; as if the Room was locked up, and the Key in the Keeping of another Person, &c. 3 *Inst.*

The Aiders and Abettors in committing a Rape, are deemed as Principals.

Cestuy que ayd in Rape est Ravisher. Law French.

In Lord *Audley's* Case, he was indicted and executed for assisting a Servant in ravishing his own Wife.

And she at the Trial was admitted as a Witness against him.

Antiently Rape was punish'd, by the Loss of Eyes and Privy Members, the offending Parts.

9. The Crime of *Buggery*, or *Sodomy*, is a carnal Copulation against Nature; as of a Man with a Man, or Man or Woman with a Brute Beast.

And as in Rape, so in Buggery *Debet esse Penetratio*, as well as *Emissio*; but any the least Degree of it is sufficient. *Hale*.

'Tis said that formerly this vile and horrible Offence, was punished with Burning or Burying alive: It is now Felony by Statute excluded Clergy, in the Agent and all that are present aiding or abetting.

Also in the Patient consenting, if he be not within the Age of Discretion.

Persons that attempt to commit this Crime undergo a severe Punishment of the Pillory, &c.

Fortescue is of Opinion that this Crime committed by a Man on a Woman is Felony. *Fort. Rep.*

See more of Crimes and Offences under *Felony*.

III. Of Maxims and General Rules.

A Maxim in Law is said to be a Proposition, of all Men to be confessed and granted, without any Proof, Argument or Discourse. *Contra negantem principia non est disputandum.*

Maxims are one of the Grounds of the Law of England, and are of the same Weight in Law as the Statutes, and the general Customs of the Realm are their Strength and Warrant.

What is a Maxim in Law, and what is not, shall be determined by the Judges, and not by a Jury.

Of Maxims and General Rules the Books of Law are full; but the chief of the Latin Maxims, affecting Life, Liberty or Property, with useful Observations thereon, are such as follow.

1. *Actus Dei Nemini facit Injuriam*: The Act of God does Injury to no Man.

The Reason of our Law is so much ruled by Religion, that it will not permit the Act of God to prejudice any: Therefore if an House is blown down by Tempest, the Tenant is excused in Waste; but if he expressly covenant to repair, there an Action lies. *Noy.*

If a Defendant dies in Execution for Debt, the Plaintiff in the Action shall have a new Writ of Execution, because the Defendant's Death is the Act of God.

And otherwise the Plaintiff would lose his Debt without any Default in him.

2. *Actus Legis nulli facit Injuriam*: The Act of the Law doth Injury to none.

For if Land, out of which a Rent-charge is granted, be recovered by elder Title, and thereby the Rent-charge becomes avoided; yet the Grantee shall have a Writ of Annuity. *Dyer.*

This is because the Rent-charge is made void by Course of Law.

3. *Actus me invito factus, non est meus Actus*: An Act done against my Will is not my Act.

36 Of Marins and General Rules.

As where a Person is compelled, for fear of Imprisonment, to make a Bond, Deed, or other Writing; the Compulsion will render the same void, as if it had never been made. 1 Inst.

And not only a Deed, but a Marriage procured by Dures, is likewise voidable; for all Acts ought to be voluntary, and the Law hath a special Regard to the Safety and Liberty of Persons.

If one obliges another to surrender his Estate, it amounts to a Disfeisir of him. 14 Affs.

4. *Actio Personalis moritur cum Persona*: A Personal Action dies with the Person.

In Case one commit a Trespass, or a Battery be done to a Man, and he that did it, or the other die, the Action is gone. *Noy Max.*

A Lessee for Years makes Destruction on the Lands let, and then dies, no Action will lie against his Executor or Administrator for Waste done before their Time.

Also an Action of Debt lies not against Executors upon a simple Contract, for the Eating and Drinking of the Testator; for that Action dies with him.

And because the Executors cannot wage their Law or deny it, as the Testator might have done. 9 Rep.

5. *Accusare Nemo se debet nisi coram Deo*: No Man ought to accuse himself, unless it be before God.

An Oath is not lawful whereby any Person may be compelled to confess, or accuse himself, &c. Likewise a Person may not swear for himself, but only where he has particular Power by some Statute. 4 Rep.

The Law will not enforce any one to shew or say what is against him; for which Reason an Offender, tho' ever so culpable, may plead *Not Guilty*.

6. *Aliquis non debet esse Judex in propria Causa*: No Person ought to be a Judge in his own Cause.

It is unreasonable for Persons to be at the same Time Judges to give Sentence, Ministers to make Summons, and Parties to have a Share in Debts, &c. to be recovered. *Dyer.*

And therefore a Lord of a Manor having Cognizance of all Kinds of Pleas, cannot hold Plea to what himself

Of Maxims and General Rules. 37

is a Party; nor may Justices of Peace act in any Matter relating to themselves; except in certain Parish Business, by a late Statute. 16 Geo. 2.

But an Inn-keeper in his own Cafe, may detain a Guest's Horse until Satisfaction be made for Standing, and other Charges: And a Person may retake his own Goods, of which he is dispossessed, &c.

One cannot generally be Witness in his own Cause; for it is presumed by the Law that he will be partial in speaking for his Advantage. 1 Inst.

7. *Ambiguum Pactum contra venditorem interpretandum est*: An ambiguous Deed or Contract is to be expounded against the Seller or Grantor.

So that if a Man having a Warren in his Lands, grants the same Land for Life, without mentioning the Warren, yet the Grantee shall have it with the Land.

For otherwise the Grantor should have excepted such Warren out of the Deed or Grant. Bacon.

But Words shall be taken in the most favourable Sense for the Speaker; as in an Action against a Man for saying of the Plaintiff that he hath forsworn himself, it may be construed to be in common Conversation.

And the Action is only maintainable where it is said he hath forsworn himself in a Court of Record. 4 Rep.

8. *A Verbis Legis non est recedendum*: We ought not to go from the Words of the Law.

The Judges may not make any Interpretation of a Statute, against the express Words thereof; for nothing can so well declare the Intent of the Makers of an Act of Parliament, as their direct Words in it themselves. 5 Co. Rep.

All Acts of Parliament and Letters Patent must be construed one Part with another, and all the Parts of them together; and the Words are to be taken in a lawful and rightful Sense, and applied to the Advancement of the Remedy, &c. 1 Inst.

But Cases out of the Letter of a Statute, yet being within the same Mischief, shall be within the Remedy the Statute provides.

9. *Bastardus*

38 Of Marriages and General Rules.

9. *Bastardus nullius est Filius; Aut Filius Populi:* A Bastard is the Son of none, or the Son of the People.

As a Bastard is born out of Marriage, his Father is not known by the Law; therefore he shall not inherit or be Heir to any Person, and for that he is in Law as no Man's Issue; and he can have no Heir but of his own Body; because of the Uncertainty who is related to him.

1 Inst.

The Bastard of a Woman is said to be no Child, where the Mother gives Lands to him as such; but having by Time gained a Name of Reputation, he may take a Remainder, as a reputed Son; and may himself purchase by his reputed Name, &c. Dyer.

In Case a Child is born only a Day after Marriage, between Parties of full Age, it is no Bastard, but supposed to be the Husband's: So if a Man takes a Wife, big with Child by another, who was not her Husband. Roll. Abr.

And if the Husband be within the four Seas, that by Intendment of Law he may converse with his Wife, and she hath Issue, the Child cannot be proved a Bastard.

These Cases are, unless there be an apparent Impossibility, that the Husband should be the Father of it; as if he has lost his Genitals, &c. 1 Co. Inst.

10. *Caveat Actor:* Let the Actor take Care what he does.

If a Landlord gives an Acquittance to his Tenant for the last Rent due, all Rent in Arrear is presumed to be satisfied.

And in Case a Person bound by Bond pays a lesser Sum before the Day appointed, or at another Place than is limited, and the Obligee or Lender of the Money then and there receiyeth it, this is a good Satisfaction. 1 Inst.

Acceptance of Rent affirms, and makes a voidable Lease to have Continuance; and if where a Tenant or Lessee assigns over his Term, the Landlord accepts the Rent of the Assignee, knowing of the Assignment, he cannot afterwards sue the Lessee for Rent. 3 Rep.

An Executor paying Debts on simple Contract, before those of a higher Nature on Judgments, &c. is liable to the Payment of all. Plowden.

And

Of Marriages and General Rules. 39

And taking any of the Goods of the Deceased, makes a Man Executor in his own Wrong, and answerable.

11. *Causa & Origo est materia Negotii*: The Cause and Beginning is the Matter of the Busines.

Altho' the Law gives Power to a Person to enter a Tavern; the Lord to distrain his Tenants Beasts; him in Reversion to view if Waste be done; a Commoner to enter into the Land to see his Cattle, &c.

Yet if he that enters the Tavern commits a Trespass, or the Lord that distrains for Rent, &c. kills the Distress, or if he who enters to view Waste breaks the House, or the Commoner cut down Trees;

In these and the like Cases, the Law will judge that they entered for that Purpose, and they shall be Trespassers from the Beginning. 8 Rep.

12. *Cessante Causa, cessat Effectus*: The Cause ceasing, the Effect also ceaseth.

Where a Woman married is divorced from her Husband, she shall have her Goods given in Marriage, not being spent; for they were given in Advancement of the Woman, and the Cause and Consideration of that Gift is defeated. Dyer.

In an Action where a Debt is the Cause of Execution, on Lands or Goods, if the Plaintiff releases to the Defendant all Debts, the Discharge of the Debt, discharges the Execution which is the Effect of that Cause.

If an Office be granted to a Person, to perform certain Busines, and he fails in his Duty, the Office shall cease and determine. Plowd.

13. *Coniunctio Maris & fæminæ est de jure Naturæ*: The Conjunction of Man and Wife is of the Law of Nature.

The Bodies and Minds of Persons are both joined in Matrimony; in contracting which, the Consent of the Mind is chiefly regarded: Wherefore it is said, that the Parties Consent, and not the Copulation, makes the Marriage. 1 Inst.

All Persons may lawfully marry, that are not near of Kin and prohibited by the *Levitical* Degrees; and the Age of Consenting thereto is fourteen Years in the Man, and

40 Of Maxims and General Rules.

and twelve in the Woman: If they marry before, at those Ages they may disagree to it. *Danvers's Abr.*

A Husband and Wife are accounted in Law but as one Person: And by Marriage the Man is intitled to all his Wife's real and personal Estate; As the Husband is the Woman's Head, all she hath is her Husband's; but then he is liable to the Payment of her Debts. *Finch.*

An Action of Debt lies against the Husband for Goods sold to the Wife; the Law presumes they come to his Use: But a Wife may not make any Contract, without the Husband's Consent, except it be for necessary Things for her Family, &c. if she do otherwise, it will not be binding to him. *2 Inst.*

The Wife is *sub Potestate Viri*, and therefore her Acts shall not bind herself, unless she levy a Fine of Lands, &c.

14. *Confuetudo Manerii & Loci est observanda*: The Custom of the Manor and Place is to be observed.

It is the Custom of Manors must direct what a Copyholder ought to do, or ought not to do; but Copyhold Estates shall not have the collateral Qualities that Estates of the Common Law have, without a special Custom.

1 Co. Inst.

According to the general Custom, if a Copyholder commit Waste, either permissive or voluntary; or do not pay his Rent to the Lord, being demanded on the Land; or if he refuse to do Suit of Court.

Or in Case he makes a Lease of his Estate, for longer Time than a Year, without Licence from the Lord, &c. either of these will be Forfeitures of Copyhold Estates.

15. *Cuicunque aliquis quid concedit, concedere videtur & id sine quo res ipsa esse non potest*: To whomsoever any one shall grant any Thing, he grants that without which it cannot be.

If Lands are granted to a Man, he has an implied Covenant for peaceable Enjoying the same, and the Law allows him a Way thereto, without being expressly mentioned. *1 Inst.*

And where a Person grants all the Timber Trees growing in his Woods, the Grantee may come upon the Ground, and cut them down, and carry them through all

Of Marins and General Rules. 41

all his Land, though the Grass receive Injury by the Carriage.

For Trees are proper to be carried by Carts, and when a Man has Title to the principal Thing, he shall always justify the necessary Circumstance. *Plowden.*

A Tenant at Will sowing Corn on the Ground, if he be ousted by the Lessor, shall have free Entry, Egress and Regress, for cutting and carrying away the same.

And in Case he be disturb'd therein, he may bring an Action and recover Damages.

16. *Cui licet quod Majus, non debet quod Minus est non licere* : To whom it is lawful to do the greater, to him 'tis not unlawful to do the lesser Thing.

Where there is a Custom that Lands may be granted to any one in Fee-Simple ; here the Grant to a Person and the Heirs of his Body, or for Life, is within that Custom.

5 Rep.

A Person who has an Office to him and his Heirs, may make an Assignee, and consequently a Deputy.

17. *Dilatationes in Lege sunt odiosæ* : Delays are odious in the Law.

The Delaying of Justice is an Obstruction to and a Kind of Denial of it ; and Pleas that are dilatory shall not be received, unless sufficient probable Matter is shewn for it, or the Truth of them be proved by *Affidavit*.

If a Plaintiff forbears to bring his Cause to Trial, the Defendant is not to be delay'd, but may take out a Writ of *Venire facias*, directed to the Jury to try the Cause ; by what is termed *Proviso*. *Old Natura Brew.*

And by a late Statute, if the Plaintiff do not proceed to Trial in convenient Time, he shall be nonsuit.

In Criminal Cases, where Persons are committed to Prison for capital Offences, as Treason, Felony, &c. expressed in the Warrant, on Prayer in open Court the first Week of the Term, or Day of Sessions, they are to be brought to Trial.

If they are not indicted the next Term or Sessions, upon Motion made the last Day of such Term, &c. they shall be admitted to Bail, unless the King's Witnesses are not ready.

And

42 Of Maxims and General Rules.

And in Case they are not tried the second Term, &c. they may be discharged. *Habeas Corpus Act, 31 Car. 2.*

18. *Dormit aliquando jus, Moritur nunquam:* A Right sometimes sleeps, but never dies.

In the Eye of our Law, Right is of such an high Estimation, that the Law preserves it from Death and Destruction; for tho' trodden down it may be, 'till ever trod out. *Coke.*

A Right to Land it is held cannot die; indeed a Release of a Person's Right enures by Way of Extinguishment, but then it's so understood in Respect of him that makes the Release, &c.

19. *Dominium a Possessione capisse dicitur:* Right and Dominion is said to have its Beginning from Possession.

According to this Maxim, a long and quiet Possession establishes a Right; but then it must exceed the Memory of Man; and if there be Proof of Record, or in Writing to the contrary, tho' it exceeds the Knowledge or Memory of any one living, yet 'tis judged within Memory. *a Co. Inst.*

The Reason why a peaceable Possession, without Contradiction, makes a Right in Law, is that thereby there may be Certainty of Titles to Estates.

In a Writ of Right the Limitation of Time is made Sixty Years, by *32 H. 8.*

20. *Expressum facit cessare tacitum:* A Matter expressed, causes that to cease, which by Intendment of Law was implied and not expressed.

A Man makes a Lease rendring Rent, and the Words of Reservation are expres to the Lessor only, the Heir shall not have it; but if no Person be said to whom the Rent shall be paid, this by Implication shall be to the Lessor and his Heirs. *Dyer.*

An express Covenant qualifies the Generality of a Covenant in Law, and restrains it by the Assent of the Parties, so that it shall extend no farther than it is expressed in the Covenant.

But a Warranty in Law is not destroy'd by an express Warranty; as if one grants a Lease, reserving a certain Rent,

Of Marriages and General Rules. 43

Rent, in which he binds himself and his Heirs to Warranty of the Land, &c.

There the Warranty express'd shall not make that in Law cease, or be of no Effect, but the Lessee may choose which he pleases. 4 Rep.

21. *Fortior & Potentior est dispositio Legis, quam Hominis*: The Disposition of the Law, is of greater Force than the Disposition of Man: This is explained in Surrenders of Estates.

As if a Person having granted a Lease of Lands for Years, to begin at *Lady Day* next, he cannot make a Surrender of his future Interest, because there is no Reversion wherein it may be drowned.

Though in Case the Lessee before *Lady Day* take a new Lease of the same Lands, &c. for Years, either to begin presently or at *Lady Day*, this is a Surrender in Law of the former Lease and Interest. 10 Co. Rep.

22. *Furiosus solo furore punitur*: A Madman or Lunatick is punish'd by his Madness.

If a Madman kill another, he hath not broken the Law, altho' he has broken the Words of it; because he had not any Memory or Understanding, but meer Ignorance which comes from the Hands of God. Plowden.

And therefore such Madman has Favour shewn him by Reason of his Disability; he shall not suffer for any felonious Act; nor can the Punishment of a Lunatick without his Mind and Discretion, be an Example to others. 1 Inst.

A Madman, in a Civil Case, cannot promise or contract for any Thing, or do any Busines; and this is because he understands not what he does: All his Acts may be avoided, either by the King, who has the Care of the Estates of Lunaticks, or by his Heirs.

But if a Man *non Compos mentis* levy a Fine, or suffer a Recovery of Lands, &c. these being Matters of Record, shall bind himself and his Heirs. 4 Rep.

23. *Hæres Legitimus est quem Nuptiæ demonstrant*: He is lawful Heir whom Marriage demonstrates so to be.

44 Of Maxims and General Rules.

A Child born within Marriage, tho' ever so soon after, is in Law legitimate, and Heir to the Husband: But an Alien may not be Heir, tho' born in lawful Wedlock.

In Case a Child be born in second Marriage, within nine Months after the first Husband's Death, he may be Heir either to the first or second Husband. *Braction.*

A Bastard is excluded from being Heir; and a Monster without human Shape, cannot be Heir to a Person but an Hermaphrodite, if there be any such, may take Lands, &c. as Heir according to that Sex which is most prevalent. *1 Co. Inf.*

The eldest Son, after the Death of his Father, is his Heir: And if there be Grandfather, Father and Son, and the Father dies before the Grandfather, the Grandson shall be Heir; who is termed *Hæres jure Repraesentationis*, because he represents his Father's Person. *Broke Ab.*

Till the Death of the Ancestor one is called Heir apparent; and by the Common Law, a Person cannot be Heir to Goods and Chattels.

There is an *Ultimus Hæres*, on the Escheat of Lands, for want of lawful Heirs; which is the Lord of whom held.

24. *Ignorantia Juris non excusat*: The Ignorance of the Law doth not excuse one.

Ignorance of the Law, even in Infants being of the Years of Discretion, shall be no Excuse, if they commit Crimes; and altho' it be invincible, as where a Person affirms that he has done all that in him lies to know the Law. *Doctor and Stud.*

For every Man is bound at his Peril to take Notice what the Law of the Realm is.

If any Person takes upon him to know the Law, and thro' Ignorance openly affirms that a void Lease, &c. is good, to the Prejudice of another's Title; he may have an Action against him, and recover Damages. *1 Rep.*

25. *Ignorantia facti excusat*: Ignorance of the Fact excuseth.

A Person

Of Maxims and General Rules. 45

A Person buys a Horse in a Fair or Market of one that had no Property in him; if this were unknown to the Buyer, he has good Right to the Horse, and his Ignorance shall excuse him.

But here, if he had known the Seller had no Right, the Buying in open Market would not have excused.

Where an illiterate ignorant Man seals a Deed, and it is read to him false, that makes the same void. 2 Co. Rep.

26. *Impotentia excusat Legem*: The Law excuses Impotency.

This Maxim regards the Infirmities of Persons, where the Law excuseth their not doing certain Acts; as of Men in Prison, out of the Realm, Ideots and Lunaticks, Persons Blind and Dumb, &c. 1 Inst.

Legal Imprisonment, without any Covin, shall be a good Excuse for a Parson's Non-Residency, by Reason of his Impotency.

If a Disselee be an Infant, Feme Covert, or in Prison, &c. and the Disseleor dies seised of the Land, it shall be no Descent to take away an Entry, because of Impotency in such Persons. Finch.

And their Right of Action is saved, till their Impediments are remov'd, where others are bound by the Statutes of Limitation.

27. *Injuria illata in Corpus non potest remitti*: Injuries to the Body cannot be remitted or forgiven.

Our Law carefully provides for punishing forcible Injuries, between Person and Person, because they are most contrary to the Repose of the Kingdom, on which the publick Felicity depends.

And the Life and Member of every Subject are under the King's Protection, to the Intent they may serve him and their Country when Occasion requires. Coke.

So tender is this Part of our Law, that if one do but menace another, with a Weapon or Staff, or in Case he stretch forth his Arm, or give any other Token, whereby his Intention of Striking appears; it is actionable;

They are in legal Construction deemed an Assault, tho' no Stroke be given.

46 Of Maxims and General Rules.

28. *In omnibus quidem, maxime tamen in Jure Aequitas est*: In all Things, but especially in the Law, there is Equity.

The Laws themselves desire to be ruled by Equity; which is said to be a Correction of the Law, wherein it is any way wanting by Reason of the Generality of it. *Plowd.*

The Statute of Gloucester gives an Action of Waste against Tenants for Life or Years; and by the Equity of it, this Action lies against him that holds Land for one Year only, or twenty Weeks, &c. And if a Lessor come upon the Ground of the Lessee, it shall be intended that he came to see whether Waste were done.

For Equity turns all to the best, and makes every Act lawful, when it is indifferent if it be so or not. *Finch.*

If a Person does make a Feoffment to a future use, the Feoffee shall be seised of the Lands, &c. to the Use of the Feoffor and his Heirs in the mean Time; and this is by Equity.

29. *In omnibus fere Minori aetati Succurritur*: In all Cases, generally there is Favour shewed to Persons within Age.

No Man or Woman before the Age of twenty-one Years can alien or sell any Lands, Goods or Chattels, or bind themselves by Deed; so careful is the Law of their Interest; unless it be for Eating, Drinking, Schooling, Physick, and other Necessaries. *1 Inst.*

An Infant is permitted to do any Thing for his own Advantage, but not to his Prejudice; he may make a Purchase, which is intended for his Benefit, tho' at his full age he may either agree to or wave it.

Infants may buy Things, but cannot borrow Money even to buy clothes; for the Law will not trust them with Money, but at the Peril of the Lender, who must see the same thus laid out. *1 Salk.*

A Presentation to a Benefice is to be made by an Infant within the six Months, being a Thing of Necessity, otherwise Lapse shall incur against him; and he must perform a Condition annexed to an Estate by his Ancestor, or shall be barred of the Right to the Lands.

Of Marriages and General Rules. 47

In some Cases also an Infant is impleadable at Law, and for his Contempt shall receive the same Punishment as a Man of full Age. *Dyer.*

30 *Jus sanguinis, quod in legitimis Successionibus spectatur, ipso Nativitatis tempore quæsum est:* The Right of Blood, which is regarded in lawful Successions or Inheritances, is found in the very Time of Nativity.

It is therefore *jus primogeniturae*, or Right of Elder-Brothership, is principally respected; And 'tis a Maxim, that the next of the worthiest Blood shall ever inherit; As the Male and all Descendants from him, before the Female; and the Female, of the Part of the Father, before the Male or Female of the Mother's Part, &c. *I. Inst.*

Among the Males, the eldest Brother, and his Posterny, inherits Lands in Fee simple before any younger Brother.

31. *Lex neminem cogit ad impossibilia:* The Law compelleth no Man to Impossibilities.

If the Condition of a Bond be possible at the Time of making it, and before it can be performed, becomes impossible by the Act either of God, or the Law, or of the Obligee, &c. the Obligation is not forfeited.

But where a Condition for Payment of Money is made impossible in Respect of Time; as if it be to pay the same on the Thirtieth of February, and there is no such Day, it is due and payable presently. *1 Co. Inst. 206.*

Where a Man is bound by a Recognizance or Bond with Condition for his Appearance the next Term in such a Court, and before the Day the Cognitor or Obligor dies, the Obligation will be saved; because it is impossible the Condition should be performed.

So in Case a Lease be granted for twenty Years, upon Condition that the Lessee dwells upon the Lands the whole Term, and he lives but ten Years, the Executors shall enjoy the Lands; for the Condition is become impossible. *Doderidge.*

A Condition of a Bond to go to *Rome* in a few Hours, is void and impossible; but 'tis said the Obligation may be good.

48 Of Maxims and General Rules.

32. *Legis Constructio non facit Injuriam*: The interpretative Construction of Law shall wrong no Person.

In Case an Executor of a Will grants all his Goods and Chattels, the Goods which he hath as Executor shall not pass, for that would be a Wrong to the Testator's Estate. 10 Edw. 4.

And where Tenant in Tail, or for Life, makes a Lease generally, it shall be taken for the Life of the Lessor or Grantor, or else it would be wrongful to him in Reversion.

Though if a Person seised in Fee, make any Lease for Life, without mentioning for whose Life, it shall be construed for the Life of the Lessee. 1 Inst.

33. *Lubricum Linguae non facile in paenam est trahendum*: The Rashness of the Tongue is not easily punished.

This is where Words are spoken in a Passion; for in all Cases Words of Heat, as to call a Man Rogue, Villain, Knave, &c. unless it be said in such an Affair, or to a certain Person, will bear no Action at Law.

4 Rep.

But if one reproaches another with some heinous Crime; calls a Person Thief, a Merchant Bankrupt, says of an Attorney he deals corruptly, or calls any one a perjured Man; an Action of the Case lies for Damages, because these Slanders are of great Import, and concern a Man's Life, Estate and Condition.

To call a Person Bastard, that is Heir to an Estate; or say a Man has the French Disease, &c. when he is courting a Woman, are held actionable. Danvers Abr.

34. *Mutata forma prope interimitur Substantia rei*: The Form being changed, the Substance of the Thing is destroyed.

In case a Person cuts down another's Timber Trees, and squares them to make Beams for a House, he may seize the same, before they are thus used.

Tho' if they are laid in the Building, they may not be seized by the Owner, for their Nature is then altered, and they are become Part of the House; yet the Party shall have his Action for the Damage. Doderidge.

And.

Of Maltins and General Rules. 49

And where the Man gets the Barley of another, and makes it into Malt, it cannot be taken again by the former Owner, tho' its Form is not lost; because it is become a Thing of another Nature and Use.

35. *Necessitas non habet Legem*: Necessity hath no Law.

Where a Fire happens in the Street of a Town, any Person may justify the Pulling down the Wall, or House of another, to prevent the Spreading thereof; as it is a Case of Necessity.

And if several Persons are in Danger of Drowning, by the Casting away of a Ship, or Boat, one to save his Life may thrust another from a Plank, or the Boat's Side, &c. tho' such other be thereby drowned. *Bacon*.

According to our antient Books, if a Man steals Victuals meerly to satisfy his present Hunger, it is neither Felony nor Larceny, being for the Necessity of preserving Life. *Staunford*.

But this having encouraged Thefts, 'tis now adjudg'd otherwise; and the Privilege of Necessity shall not prevail against the Commonwealth.

The great Lord *Coke* says, *Necessitas est Lex Temporis.*
8 Rep.

36. *Nil magis aequitati consentaneum est, quam ut iisdem modis res dissolvatur quibus constituitur*: Nothing is more agreeable to Equity, than that every Thing should be dissolv'd by the same Means it was first constituted.

Every Contract and Agreement must be released by a Matter of as high a Nature as that was; so that a Deed in Writing under Hand and Seal, can only be released by some other Writing, signed and sealed, &c. 5 Rep.

And therefore an Obligation or Matter in Writing, cannot be discharged by an Agreement by Word.

Where an Estate is vested in the King by Matter of Record, it may not be divested out of him but by the like Matter: And an Act of Parliament shall not be avoided but by Parliament. *Plowden*.

37. *Nullus commodum capre ptest de injuria sua propria*: No Man shall take Advantage of his own Wrong.

50 Of Varinis and General Rules.

If a Man be bound in a Bond to appear at a Day before Justices, on which Day the Obligee casts him in Prison, so as he cannot come; no Benefit shall be had of this Bond. *Noy.*

In Case a Lessor and Lessee of Lands for Years, join in the Cutting down of Timber, the Lessor shall not punish the Lessee for such Waste; and take Advantage of his own Wrong by joining therein.

An Appeal of an Infant may not stay for his full Age, which would be taking Advantage of his own Wrong.
27 H. 8.

38. *Nullum iniquum in Jure præsumendum est:* No injurious Thing is to be presumed in the Law.

All Things are taken to be lawfully done, till Proof is made to the contrary; and Fraud shall never be intended or presumed by the Law, unless it be expressly averred.

Where no Fraud is found by the Jurors in a Feoffment, the Judges shall not adjudge the same fraudulent; and altho' Jurors have found Circumstances and Presumptions to intitle the Finding of Fraud, it is but Evidence, and not any Matter upon which the Court may judge thereof. *10 Rep.*

For the Office of the Jurors is to adjudge upon the Evidence concerning Matters of Fact, and thereupon to give their Verdict; and not leave Things to the Judgment of the Court, which do not appear to them.

39. *Omne Actum ab agentis intentione est judicandum:* Every Act is to be judged from the Intention of the Agent.

'Tis held in Contracts and Obligations, the Intention of the Parties is the chief Thing that the Law regards; for such Words as shew the Assent of Parties, and have Substance in them, are sufficient.

A Bond ran thus, Know all Men by these Presents, that I *A.* am held and bound to *B.* in twenty Pounds, to be paid to the said *A. &c.* This Obligation was adjudg'd good, for the Parties Intention appears. *Plowden.*

The Law will likewise take one Word for another in Deeds, to supply the Intention of Persons; as where a Man has a Remainder of Lands, if he grants it to another,

Of Maxims and General Rules, 51

other, by the Name of a Reversion, the Grant is good, notwithstanding the mis-termining of the Thing. 1 Inst.

In Wills, the Intent of the Testator shall generally be observed.

40. *Possessio fratris de feodo Simplici facit Sororem esse Heredem*: The Possession of the Brother, of a Fee-Simple, makes the Sister to be Heir.

A Man has Issue a Son and a Daughter by one Woman or Venter, and a Son by another, then dies seised of Lands in Fee Simple, and the eldest Son enters into the Lands, after which he dies without having any Issue;

Here the Sister shall have the Land, and not the younger Son or Brother, tho' he be Heir to the Father; but there must be an actual Entry upon the Land, otherwise it goes to the younger Brother. 1 Co. Inst.

The Possession of a Brother of an Estate-Tail, shall not make the Sister Heir; for it descends to the younger Son of the Half Blood, who ought to have it *per formam Domi*. Plowden.

41. *Prohibetur ne quis faciat in suo, quod nocere possit in alieno; & sic utere tuo ut alienum non laedas*: It is forbidden that any one should do that in his own, which may injure another; and so use your own, that you do not hurt others.

Where a Man doth any Thing upon his own Ground to the particular Damage of his Neighbour, 'tis accounted a Nuisance; and an Action lies for it, or the same may be abated or removed by the Persons that are prejudiced thereby. Wood.

If a Man has an House that has good Lights, and a Stranger having Lands adjoining, builds a new House on his Lands so near, that the Windows of the other are darkened by it; 'tis an Offence actionable.

As is also the Setting up or making a House of Office, Dye-house, Lime-pit, &c. so near to another's House, that the Smell thereof annoys him, or is infectious; or if the Corruption of the Water of the Pits hurts his Water, or Grafs, or destroys Fish in a River, &c. 3 Inst.

42. *Prximus sum egomet mibi*: Every one is next to himself.

52 Of Mārums and General Rules.

In Case of Wills, where an Executor is appointed, he may pay himself a Legacy, before any other ; and among Debts of equal Degree, the Executor may pay his own Debt first. *Noy.*

Executors are nearer to the Testator, and do more represent his Person, than the Heir does the Ancestor ; this is held, because if an Executor be not named in a Mortgage, yet the Law appoints him to receive the Money.

But the Heir shall not receive it, unless he be named.
1 Inst.

43. *Publicum bonum Privato est preferendum* : The publick Good is to be preferred before private Interest.

A Woman intitled to Dower shall not be indow'd of a Castle of Defence, for that is *pro bono publico* ; but as to Castles for private Use and Habitation, 'tis otherwise.

The Inhabitants of a Village may make By-Laws for repairing a Church, or Highway, or any such Thing as is for the publick Good generally ; and the greater Part shall bind all of them, without Custom. *5 Rep.*

And Corporations have Power to make Ordinances, for the Government of their Bodies Politick, and better Execution of the Laws of the Realm : But they may not do so, without a Custom or Charter, unles it be for Things concerning the publick Good.

44. *Quælibet concessio fortissime contra donatorem interpretanda est* : Every Man's Grant shall be taken most strongly against himself.

Whenever a Deed is uncertain, and the Words of it are ambiguous, it shall be construed most strongly against the Grantor therein ; as if a Man grants an Annuity out of Land, and he hath no Land at the Time of the Grant, it shall nevertheless charge his Person.

And where any Deed made to a Person, is good for Part, and for some Part thereof not good, that which is for the Benefit and Advantage of the Grantee, shall stand good in Law. *1 Co. Inst.*

But altho' Grants are taken strongly against the Makers, yet no Wrong must be done by it ; and a Man may not be obliged by his own Act and Deed to do some Things which are against Law.

Of Marins and General Rules. 53

For if a Husbandman be bound not to till or sow his Land, the Obligation is contrary to the Common Law, and void. 11 Rep.

45. *Qui facit per alium facit per Se*: What one does by another he does by himself.

If a Man empowers another by Letter of Attorney to sell and alien his Land, and he doth so, it is his Alienation by him; and where a Person gives Authority to his Bailiff to sell Cattle, and he doth it, this will be his Sale by the Bailiff. *Plowden*.

Where any Person has a Bailiff or Servant, who is known to be such, and he sends him to Markets to buy Goods, his Master shall be chargeable with the Payment, if the Things come to his Use.

In Case he sells his Master's Cloth, and warrants it to be good, or of a certain Length, when it is not so, an Action lies against the Master only, and not the Servant. *Noy*.

And if a Person commands one to do a Trespass, or to beat another, he shall be himself a Trespasser.

46. *Qui sentit onus, sentire debet & commodum*: He who bears the Burden, ought to receive the Profit.

A Man seised of Lands in Fee hath Issue a Daughter and dies, his Wife being with Child of a Son; the Daughter enters and sows the Lands, and then the Son is born, and his next Friend enters, here the Daughter shall have the Corn growing on the Ground. *Perkins*.

Also a Tenant for Life, or in Dower, having sown Corn upon the Land, may devise the same growing at the Time of their Deaths; and their Devisees shall have it. 7 *Affis*.

47. *Qui sentit commodum, sentire debet & onus*: He that reaps the Profit ought to bear the Burden.

If a Person grant a Rent-charge for Life out of his Land, and afterwards conveys the Land to others, in every one of whose Time the Rent is behind, and then the Grantee dies, his Executor may bring Action of Debt against all of them for Rent due in their Time; as they all have the Profit of the Land. 4 *Rep*.

And on Assignment of a Lease, the Lessee who hath covenanted to Repair, may have an Action of Covenant against

54 Of Maxims and General Rules.

against his Assignee, for suffering a House to decay; because he that enjoys the Profit, must bear the Burden and Charges.

Where Persons enjoy Benefit by making Banks of a River, they are to contribute to the Repairs thereof. 5 R.p.

48. *Quod initio vitiosum est, tractu Temporis non convalescat*: That which in the Beginning is vicious, cannot by Tract of Time be made good.

In Case a Bishop makes a Lease of Church Lands for four Lives, which is contrary to the Statute, tho' one dies in his Life-time, so as now there are but three, and afterwards the Bishop dieth, yet it shall not bind his Successor.

For here the Lease so made had a bad and unlawful Beginning, it being for more Lives than the Act allows, and therefore cannot be brought to a good End. 10 Co. Rep.

If an Infant, or Feme Covert, that is, a married Woman, makes a Will, and publishes the same, and afterwards dieth being of full Age or Sole, both these Wills notwithstanding will be void and of no Effect.

And this is because the Foundation, *viz.* the Making and Publishing are void. *Plowden.*

49. *Quod est inconveniens, & contra Rationem non est permisum in Lege*: Whatever is inconvenient, and contrary to Reason, is not permitted in the Law.

It is likewise a Maxim, that what is contrary to Reason, is unlawful: And hence it is said that all Positive Laws, which are contrary to the Laws of Nature, and of Reason, are no Laws at all.

Therefore if a Town hath Customs, which are against Law and Reason, and those Customs are confirmed by Act of Parliament; such Confirmation shall not make them to be good and binding. 1 Inst.

But no Person ought, out of his own private Opinion, to be wiser than the Law.

50. *Quod alias bonum & justum est, si per vim vel fraudem petatur, malum & injustum est*: What otherwise is good and just, if it be acquired by Force or Fraud is evil and unjust.

And

Of Marriages and General Rules. 55

And if it be mixed therewith, it is the same Thing; for where a Man by Will deviled Tenements to superstitious Uses, and also to good and charitable Uses; it was adjudg'd that the Commixture of the evil Use with the good, infected the good Use and destroyed it.

3 Rep.

At the Common Law Forcible Entry into Houses or Lands, &c. was no Crime, where a Person had Title, and Entry was lawful.

But by Statute none shall enter into Lands or Tenements, but in a peaceable Manner, tho' they have Title of Entry, upon pain of Imprisonment, &c. 5 Richard 2.

In this Case, Justices of Peace have Authority to commit Offenders till they pay a Fine, and to restore the Possession; or an Action of Trespass may be brought, and treble Costs recovered. 2 Inst.

51. *Rex est vicarius, & Minister Dei in Terra, omnis quidem sub eo, & ipse sub nullo nisi tantum sub Deo.* The King is the Minister of God upon Earth; every one is under him, and he under none, but only God. *Bracton.*

All the Lands in *England* are said to be holden either mediately or immediately of the King; and all Estates for want of Heirs, or by Forfeiture, on committing Crimes, Escheat to the King, as Lord Paramount.

1 Co. Inst.

Lands in the King's Possession are free from Tenure; for a Tenant is he who holds of some Lord by Service, and the King cannot be a Tenant, because he hath no Superior but God: Neither may the King be Jointenant with any, for none can be equal with him. 8 Rep.

The King's Grant is taken strongly against a Stranger, and more favourable for the King; contrary to the Grants of a common Person: And if the King grants Land in Fee-Simple, upon Condition that the Grantee do not alien or sell the same, it is good; tho' void in others. *Plowden.*

Where the Right or Title of the King and the Subject concur and meet together, his Title shall be preferred; and the King's Title is not to be tried, without Warrant from the King, or Assent of his Attorney General. 2 Inst.

Ne

56 Of Marriages and General Rules.

No Distress can be made upon the King's Possession ; but he may distrain out of his Fee in other Lands, &c. and may take Distresses in the Highway : The King may also distrain for the whole Debt or Rent due of one Tenant, where the Estate is let to several.

In whose Hands soever the Goods of the King come, their Lands are chargeable, and may be seized for the same ; and the King is not bound by the Sale of his Goods in open Market.

The Debts of the King shall be satisfied, before those of a Subject, for which there is a *Prerogative Writ*, and until his Debts be paid, he may, by Writ protect his Debtor from the Arrest of others ; but altho' the King's Debt is to be first paid, that must be when it is in equal Degree with the Subject's. *Croke Car.*

No Prescription of Time runs against the King ; he is not within the Statutes of Limitation ; an Entry shall not bar him ; nor will any Judgment be final against him, but with a *Salvo Jure Regis.* *Above 60 Years*

The King cannot be Nonsuit, as he is supposed to be present in all his Courts ; and he may have such Process in his Suit, as no other Person but himself can have : And an Action lies not against the King, but a Petition in Stead of it, to him in the *Chancery.* *Finch.*

Our King is the Fountain of Honour and Justice ; all Statutes are to have his Royal Assent, and in calling or dissolving Parliaments, declaring War and Peace, &c. his Proclamation has the Effect of a Law.

Also Acts of Parliament are not binding to the King, unless they concern the Common-wealth, or he be specially named. *1 Eliz.*

But notwithstanding the King's Prerogative is so large, as we find that to be Law almost in every Case of the King, that is Law in no Case of the Subject ;

Yet the King may not by Petition or Bill, &c. dispose of any Man's Lands or Goods.

Nor shall he take that he hath a Right to, which is in the Possession of another, but by due Course of Law.

He may not command a Man to Prison, against the Writs and Processes of Law, *Nihil Potest Rex quam quod de Jure potest.* *Fortesc.*

Of Maxims and General Rules. 57

For the Law is the Rule of the King's Prerogative, which does not extend to any Thing injurious to others.

12 Rep.

And as the Subject owes to the King his true and faithful Obedience; so the King is to defend the Laws, and protect the Bodies and Goods of his Subjects.

Protectio trahit Subjectionem, & Subje~~c~~lio Protectionem.

52. *Salus Populi Suprema est Lex*: The Health and Welfare of the People is the chiefest Law.

The main End of Government is the common Good of the Subject; and by the same Law which ordains our Kings, the meanest of the People enjoy the Liberty of their Persons, and Property of their Estates, which it is every Man's Concern to preserve to the utmost. *Fortescue.*

In Cases that are for the general Good of the People, a Man can justify doing of a Wrong; as in Time of War, a Person may erect Bulwarks on another Man's Lands: And hence it is, one may at any Time raze an House that is burning, for the Safeguard of neighbouring Houses. *Plowden.*

Trade being for the Benefit and Good of the People, Bonds to restrain the Exercise of it, are held void; and the Instruments of a Man's Trade or Profession may not be distrained, as the Books of a Scholar, Ax of a Carpenter, &c.

But this is understood when other Things may be taken as a Distress. 1 *Inst.*

53. *Semel malus semper præsumitur esse malus*: Those who once are evil, are always presumed to be so.

This has been understood, *in eodem genere mali*, in the same Kind of Evil; as perjured Persons, who have once forsworn themselves, and thereof are convicted, will not be afterwards admitted to give Evidence in any Cause, because they have once so offended.

And no infamous Person, or one attainted of false Verdict, or Conspiracy, or convicted of Forgery, or Felony, or that has stood in the Pillory, &c. shall be allowed to be a Witness. 1 *Co. Inst.*

But

58 Of Maxims and General Rules.

But if a Man convicted of Felony, or who hath stood in the Pillory, be afterwards pardoned, it restores him to his Credit as a new Man, and he may be a good Evidence. *2 Hawkins.*

54. *Su'stantia prior & dignior est accidente*: The Substance is more worthy, and before the Accident.

No Declaration or Count in a Suit at Law shall abate, so long as the Matter of Action is fully shewed in Substance in the Declaration, and the Writ, as is provided by the Statute *36 Ed. 3.*

And no Judgment shall at any Time be arrested or stayed in any Court of Record for Want of any Matter of Form in the Declaration, Plea, &c. or for any Defect whatsoever, except only Matter of Substance, which shall be shewed publickly to the Judges of the said Courts.

18 Eliz.

After Verdict is given in an Action, in the Courts at *Westminster*, the Judgment shall not be reversed by Writ of Error, for any Faults either in Form or Substance, in any Bill, or Writ, &c. or for Variance therein from the Declaration or other Proceedings, by *5 Geo. 1.*

55. *Ubi major Pars est, ibi est totum*: Where the major Part is, there, by the Law, is the whole.

The only Way of determining the Acts of many, is by the major Part, or a Majority; as the major Part of Members of Parliament enact Laws, and the Majority of Electors chuse the Members of Parliament; and the Act of the major Part of any Corporation, is accounted the Act of the Corporation. *19 Hen. 7.*

A Dean and the major Part of the Chapter make the Spiritual Corporation, and there Act is binding tho' the rest do not agree to it; for the whole Chapter is said to do what the major and founder Part doth.

And the Consent of such major Part is expressed by fixing of their Seal; which Consent is the Will of many join'd together. *Davis.*

56. *Veritas nihil veretur nisi abscondi*: Truth fears nothing but to be concealed.

And Truth is nothing else but an Affection of our Speech, and Actions agreeing with the Mind; but is properly

Of Maxims and General Rules. 59

properly called *veracitas*, that is a Speaking of Truth: Of which 'tis to be understood, that it is afraid of nothing more than to be obscured. *Plowden.*

Fraud and Covin are so mixt with Truth, as they often deceive, and put a false Gloss upon the worst Things; though the Law will never permit them to suppress the Truth, where it can be discovered.

And in all Cases it labours to make a Discovery, and censure Corruptions.

57. *Vigilantibus non Dormientibus Leges subveniunt:* The Laws help those that are watchful, and not those that are sleepy and negligent.

For want of being watchful, and by Negligence a Right may be lost; as where an Action is not brought within the Times appointed by the Statute of Limitations, 21 Jac. 1. which ordains, that Writs or Actions of Ejectment, &c. to recover Lands, are to be sued within twenty Years after the Title did arise, or the Parties will be barred.

All Actions of Debt, upon the Case, (except for Words) Actions of Account, (other than concerning Merchandise) of Detinue, Trover and Trespass, must be commenced within six Years after the Cause of Action; and all Actions of Assault and Battery, Wounding and Imprisonment, must be brought within four Years; and for Slander within two Years, after Cause of Action, and not afterwards.

If a Fine be levied of another's Lands, the Person that has Right thereto, ought to make his Claim within five Years after the Proclamation made or certified, or he will be barred thereby. 1 Rich. 3. 90

By the Common Law, Claim is to be made within a Year and a Day, after a Person is disseised of Land, or he may not enter; and if a Feme-Sole be disseised before Marriage, and then takes an Husband, there a Descent of the Lands during the Coverture, takes away her Entry. *Litt.*

But where a married Woman is disseised, if a Descent be cast during her Coverture, it bars her not of Entry till five Years after the Husband's Death.

General

60 Of Maxims and General Rules.

General Rules and Maxims concerning Descent of Lands.

Descent is a Means whereby Lands or Tenements are derived to any Man from his Ancestors.

It is a *Maxim* in our Law, That Land shall descend from the Father to the Son ; and that if a Man have two Sons by divers Venters or Wives, and the one purchases Lands and dies without Issue, the other shall never be his Heir, &c.

The *Descent* at Common Law, is either *Lineal*, or downwards in a right Line, from the Grandfather to the Father, the Father to the Son, and the Son to the Grandson, &c. so that the lineal Heirs shall first inherit ;

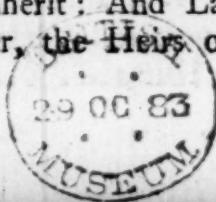
Or it is *Collateral*, that which springs from the Side of the whole Blood, as another Branch of it ; such as the Grandfather's Brother, the Father's Brother, and so downwards. 1 Inst.

In Case a Man purchase Lands in Fee, and then dies without any Issue, here for Default in the right Line, he that is next of Kin in the collateral Line of the whole Blood, tho' never so remote, shall come in by Descent as Heir to the Purchaser.

By our Law, Inheritances may descend, but cannot ascend ; and therefore in the right Line Children inherit to their Ancestors without Limitation ; but the Ancestors may not take from their Children, for the Father can never come to the Lands which his Son hath purchased, by lineal Ascent.

Though he may by collateral Ascent, as where the Son's Land comes to his Uncle, and then to the Father : In the Collateral Line, the Uncle inherits the Nephew, and the Nephew the Uncle. Litt.

There is a Law Maxim, that Lands descending on the Part of the Father, the Heirs of the Side of the Mother shall never inherit : And Lands descending on the Part of the Mother, the Heirs of the Father shall not inherit.



Of Marins and General Rules. 61

So that where Lands descend to the Son from the Father, and he enters and dies seised thereof, without having any Issue, this Land must go to the Heirs of the Father's Part, who are of the whole Blood; and if there are none such, the Land shall escheat: The same Law is, where Land descends on the Mother's Part.

But if one seised of Land, as Heir on the Part of the Mother, levies a Fine, or makes a Feoffment, and takes back an Estate to him and his Heirs; this as a Purchase will alter the Descent; and if he dies without Issue, the Heir of the Father shall inherit the Land. 1 Co. Inst.

If a Father having purchased an Estate, the same descends to a Son, who after Entry thereon dies without Heirs; 'tis said the Lands shall descend to the Heirs of the Father or Mother of the Father, and not to the Heirs of the Mother of the Son.

For altho' they are more near of Blood to him that was last seised, yet they are not of the Blood of the first Purchaser: And a Man or Woman have two immediate Bloods in them, *viz.* of the Families of their Father and Mother. *Noy.*

Where a Son purchases, and there is no Heir on the Side of the Father, his Land shall go to the Heirs on the Mother's Side; here the Law makes a Difference, where the Son purchaseth Lands in Fee, and when he comes to them by Descent.

There is also some Difference between Descents from a Father and Mother to their Children, and between Brothers and Sisters; for a Son or Daughter need be only of the Blood of either the Father or Mother, which hath the Inheritance, to be Heirs to them.

But the Brothers and Sisters must be of the same Father and Mother, to inherit one another.

To have Lands in Fee Simple by Descent, a Person must not only be Heir of the whole Blood, but he is to be the next and most worthy of Blood to his Ancestor.

And therefore where a Person has Issue two Sons, by several Venters, the younger Brother of the half Blood shall not have Land purchased by the elder Brother, on his

62 Of Waktins and General Rules.

his dying without Issue; but the elder Brother's Uncle, or next Cousin shall have it. *Finch.*

A Sister that is of the whole Blood, shall be preferred to a younger Brother who is but of the half Blood; tho' such younger Brother shall be Heir to his Father, or his Uncle, but not to a Brother, because he hath not the whole Blood in him.

If a middle or younger Brother purchase Land, and die without leaving any Issue, the elder Brother of the whole Blood will be intitled to the Land by Descent; the Eldest is the most worthy of Blood to inherit to the Brethren, as well as to the Father.

And here if there is no Brother or Sister, the Uncle shall have the Land as Heir, and not the Father; and yet it may afterwards come to the Father, as Heir to the Uncle.

Likewise in Case the Father hath Issue another Son or Daughter, after the Descent to the Uncle, that Issue may enter upon him, and hold the Estate. *3 Rep.*

In the Case of a Son's purchasing Lands, and dying without Issue; the Sister of the Father's Grandfather, and so *in infinitum*, shall be preferred in the Descent before the Father's Mother's Brother; tho' he is a Male and they are Females and more remote.

And this is because the Sisters are of the Male Line, which is more worthy than the Female Line, and shall ever exclude it, altho' the Female Line be also of the Blood of the Father. *Hale.*

If for Default of Heirs of a Purchaser, of the Father's Part, or where such an Heir had not entered, the Lands go or descend to the Line of the Mother;

There the Heirs of the Mother of her Father's Side, shall take and be preferred in the Succession, before those of the Part of her Mother, because they are the most worthy.

All the Descendants from a Person, as by Law might have been Heir to another, and have Lands by Descent, hold the same Right by Representation, as that common Root from whence they are derived.

Hence the Son, or Grandchild, whether Son or Daughter of the eldest Son, succeeds in Descents before the

the younger Son; and a Son or Grandchild of the eldest Brother, before the youngest Brother.

And so it is through all the Degrees of Succession, the Right of Proximity is transferred from the Root to the Branches, and gives them the same Preference in Law as the next and worthiest of Blood.

Also the Great Grandchild of the elder Brother, whether it be a Son or a Daughter, is to be preferred before his younger Brother; for tho' the Female be less worthy than the Male, here she stands in Right of Representation of the elder Brother, who was more worthy than the younger. *Hale Inst. L.*

Of common Descents, and Descent by Custom and Statute.

1. Lands and Tenements in Fee-simple descend, first to the eldest Son as Heir, and to his Issue; the Sons first in Order of Birth; and for want of Sons, to all the Daughters equally, who inherit in Coparcenary as one Heir.

If the eldest Son has no Issue or Children, then the Lands descend to his next eldest Brother of the whole Blood, and his Issue; and for Want of a Brother, to his Sister or Sisters of the whole Blood, and their Issue.

If there be no Brother or Sister, the Estate descends to the Uncle and his Issue, and for want of an Uncle, to the Aunt or Aunts and their Issue.

And if there are no Uncles or Aunts, then to Cousins in the neareit Degree of Consanguinity. *1 Co. Inst.*

If an eldest Son be an *Alien* born, he has no inheritable Blood in him, so that in that Case the younger Son born within the King's Allegiance, shall have Land by Descent from his Father, and not the elder Son.

2. Descent by *Custom*, is that sometimes the Lands shall descend to all the Sons, or to all the Brothers, where one Brother dies without Issue, as in *Gavelkind* in the County of *Kent*: And until the Time of *William Ist*, called

64 Of Marriages and General Rules.

called the Conqueror, this was said to be the general Descent of the Lands all over England.

Sometimes Lands descend to the youngest Son, as by the Custom of *Ecrough-English*; and sometimes to the eldest or youngest Daughter, according to the particular Customs of Places. *Litt.*

3. Descent by Statute, is a Descent in *Fee-Tail*, as directed by the Manner of the Limitation or Settlement, pursuant to the Statute *de Donis Conditionalibus*, *Westm. 2.* And in Descents of Estates-Tail, the Issue are ever of the whole Blood to the Donee.

So that Half-Blood is no Impediment to any such Descent.

Of Descent and Purchase of Lands.

whether he can buy
As Descent is created by Law, and the most antient Title, an Heir is in by that, before a Grant, or Devise to him.

Opinion
If a Man by Will devises Lands to his Heir at Law, the Devise is void, and he shall take the Land by Descent: And so it is where the Lands will come to the Heir, either in a direct or collateral Line; or if the Heir has an Estate by way of Limitation, when the Word *Heirs* is not a Word of *Purchase*. *Dyer.*

Wherever an Heir takes that Land, &c. which his Ancestor would have held and taken if living, he shall have it by Descent, and not by Purchase.

But where an Estate is given and devised to the Heir, attended with a Charge, as to pay Money, &c. in that Case he generally holds by Purchase, and not by Descent.

One is in by Purchase when he comes to Lands by legal Conveyance, either for some Consideration, or by Gift, and not as Heir at Law; whereas Descent from an Ancestor cometh of Course, by Act of Law. *1 Co. Inst.*

And there is this Difference between Purchase, and Descent of Lands; if an Heir is adjudged to take by Purchase

Of Marriages and General Rules. 65

Purchase in a Marriage Settlement, a Fine, &c. levied of the Land, may be no Bar; as it might if the Heirs took by Descent.

If one who is Heir takes Lands by Purchase, the Lands are not Assets in his Hands to pay Debts, &c. which if he had come to them by Descent, they would be. 3 Nels. Abr.

Every common Purchaser of Lands, must at his Peril take Notice of the Estates and Charges, which are upon the Land; for the Law presumes that no Man will purchase Lands, without Advice of Counsel.

Yet there are several Statutes, which guard against fraudulent Incumbrances; and Conveyances of any Estate in Land made to defraud a Purchaser shall be void. 27 Eliz.

General Rules relating to Tenures and Estates.

1. The **Fee-Simple Estate**, is where a Man hath Lands or Tenements of Inheritance, to hold to him and his Heirs for ever.

An Estate in Fee-Simple is such as is held without Limitation to what Heirs, but to Heirs generally: It is the Word *Heirs* makes the Inheritance, and a Person cannot have a greater Estate. 1 Inst.

Where Land is granted by Deed, to hold to one for ever, or if it be to him and his Assigns for ever, this is no Fee-Simple, but an Estate for Life only, because the Word *Heirs* is wanting.

Yet in Case of a Will, which is more favour'd in Law than a Grant, the Fee-Simple and Inheritance may pass without this Word *Heirs*.

If a Gift be made of Lands to a Person and his Children, and their Heirs, it is a Fee-Simple jointly to all that are alive: and if an Annuity be granted to one and his Heirs, it is a Fee-Simple *Personal*. Litt.

At Common Law *all Estates* of Inheritance 'tis said were Fee-Simple, and all other Estates are derived out of

66 Of Maxims and General Rules.

of it; for which Reason there must be a Fee-Simple at last in some Body.

Estates in Fee have been generally divided in *Fee Absolute*, otherwise termed the *Fee-Simple*, and *Fee Conditional*, otherwise called *Fee-Tail*.

And he who is seised of Lands in Fee-Simple, may give, grant or charge the same as he pleases, by Deed or Will; but so may not he that has an Estate-Tail. *Plowden.*

2. The *Fee-Tail Estate*, is an Estate of Inheritance whereof a Person is seised to him and the Heirs of his Body, begotten or to be begotten.

It is a limited Estate or Fee, opposed to that of Fee-Simple; and there must be not only the Word *Heirs*, in the Deed which creates it, but also the Word *Body*, for 'tis that makes the Estate-Tail, without which it may be a Fee-Simple Estate. *Litt.*

Fee-Tail, is either a *General Tail*, where Lands or Tenements are given to a Man and the Heirs of his Body begotten; or to a Woman and the Heirs of her Body begotten.

In which Case it is called *General Tail*, because how many Wives soever a Person as holds by this Title shall have one after another in lawful Marriage, his Issue by them severally are all capable of inheriting in their Turns.

And if the Woman has several Husbands, and hath Children or Issue by every one of them, they may inherit after each other as Heirs of her Body.

Or it is a *Tail Special*, when Lands are limited to a Man and his Wife, and the Heirs of their two Bodies begotten; and it is termed *Special Tail*, by Reason no other Persons can inherit the Lands but the Issues that are begotten on that particular Wife. *1 Inst.*

When Lands are given to a Husband and Wife, and to the Heirs of the Body of the Husband, he has an Estate in general Tail, and the Wife an Estate only for Life.

This is because, the Word *Heirs* hath Relation in general to the Husband's Body.

And if an Estate be limited to a Man's Heirs that he shall beget on the Body of his Wife; tho' it creates a Special

Of Marriages and General Rules. 67

Special Tail in the Husband, the Wife in that Case will be intitled to nothing.

If a Gift be to Persons unmarried, or to a married Man and another's Wife, and the Heirs of their Bodies, it may be a good Estate in Special Tail, if they afterwards marry. *10 Rep.*

There is an Estate-Tail within the Equity of the Statute of *Westm. 2.* where Lands are granted to a Person and his Heirs Male or Female of his Body begotten; in which Case the Male or Female Issue shall only inherit, pursuant to the Limitation.

If here the Estate be limited to Heirs Male of the Body, the Pedigree must descend by Heirs Male; and on the other Hand, if it be to Heirs Female, the Title must be derived by Heirs Female one after another.

So that where a Grant is made to a Person, and the Heirs Male of his Body, and he has Issue a Daughter, who hath a Son, and then dies, such Son may not inherit the Estate, because he cannot make his Descent by Heirs Male. *1 Inst.*

A Lease for Years may not be intailed; if it be made to a Man and the Heirs of his Body, it is void; for a Chattel cannot be turned into an Inheritance; yet it may be assigned in Trust to permit the Issue in Tail to receive the Profits of the Land; and that in Effect is an Estate-Tail.

It is incident to the Estate of Tenant in Tail, to be dispenishable of Waste; that such Tenant may levy a Fine to bar his Issues, &c. or suffer a Recovery; also he may grant Leases for twenty-one Years, or three Lives, according to the Statute *32 H. 8.* and by Custom grant Lands by Copy, &c. *4 Inst.*

He cannot in any other Manner grant or convey a greater Estate than for his own Life; or give away the Land by Will, &c.

Intails are usually created upon Marriage Settlements, where Lands are settled on the Husband for Life, then to the Wife for her Life, and to their Issue in Remainder.

And if Tenant in Tail, General or Special, die without Issue, so as there is no Heir to take according to the

68 Of Marriages and General Rules.

Limitations, the Donor or his Heirs may enter as in Reversion.

Or the Land shall descend to such Person as is limited to have it after the Estate-Tail is spent. *1 Salk.*

3. The Estate-Tail after Possibility of Issue extint, is where any Lands are given to a Husband and Wife and the Heirs of their Bodies in Special Tail, and one of them dies without Issue had between them, the Survivor shall hold the Land as Tenant in Tail after Possibility of having Issue.

This is an Estate which none can have but the Donee or Tenant in Special Tail; for the Donee in General Tail may by Possibility have Issue at any Time. *1 Co. Inst.*

Where the Donees in Special Tail have Issue, if the Issue die without Issue, so that there is none other left which may inherit by Force of the Intail; the Survivor of the Donees will have an Estate in Tail after Possibility of Issue. *Litt.*

These Tenants in Tail, as also Tenants by the Curtesy, or for Life, suffering a Recovery without the Assent and to the Prejudice of him in Remainder, incur a Forfeiture of their Estates; and such Recoveries are void.

But Tenant in Tail after Possibility of Issue, is not punishable for Waste; as is the Tenant for Life.

It is observed that by Settlements guarding against Accidents, and limiting Remainders over, this Estate now seldom happens.

4. The Estate held by the Curtesy, is when a Man takes a Wife, who is seised of Lands and Tenements in Fee-Simple, or in Fee-Tail General, or as Heiress in Special Tail, and he hath Issue by her Male or Female, which by any Possibility may inherit, and then the Wife dies.

Here the Husband after the Wife's Death shall hold the Lands during his Life, by the Curtesy of England. *1 Inst.*

And altho' the Issue by the Wife be dead, being born alive, her Husband shall be Tenant by the Curtesy; and it matters not whether the Child were ever heard to cry:

Of Marriages and General Rules. 69

cry: But in Case a Child is ripp'd out of the Mother's Belly, after her Death, tho' it be alive born, it will not give Tenancy by the Curtesy.

If Lands are given in Tail to a Woman and her Heirs Male of her Body, and she afterwards marries and has Issue a Daughter, and dies, the Husband shall not hold the Estate by the Curtesy; for this Issue cannot possibly inherit. *Terms de Ley.*

In Case Lands or Tenements descend to the Wife, after the Husband hath Issue by her, he shall be Tenant by the Curtesy; but not of a Reversion or Remainder expectant.

5. The **Estate in Dower**, is that Estate or Portion of the Husband's Lands, which the Law allows a Widow after his Decease.

By the *Common Law*, this Dower is where a Person is solely seised of Lands or Tenements in Fee Simple, or Fee-Tail General, or as Heir in Special Tail, and marries a Wife and dies; his Widow shall have a third Part of all Lands or Tenements as were the Husband's, at any Time during the Coverture, to hold during her Life. *Litt.*

This Estate the Widow shall have, whether she had Issue by her Husband or not; and 'tis not necessary that Seisin should continue to the Death of the Husband; for if he sells or aliens the Lands, it is still the same.

Dower by *Custom*, is such Part of the Husband's Estate, to which the Widow is intitled after the Death of her Husband, by the Custom of some Manor or Place, so long as she lives sole and chaste.

And it is frequently more than one third Part; for in some Places she shall have half the Land, and in others the whole during Life, which is then called her *Free Bench.* *1 Co. Inst.*

At Common Law Dower is to be assigned by the Sheriff, on the King's Writ; or by the Heir, &c. by Agreement among themselves; and antiquity a Woman was to live and continue a whole Year in the House of the Husband for the Assignment of her Dower.

70 Of Marriages and General Rules.

But by *Statute* the Widow shall immediately on the Husband's Death have her Marriage Inheritance, and shall remain in his chief House forty Days, within which Time Dower is to be assigned her of the third Part of the Lands and Tenements of the Husband. *Magna Charta.*

A Woman may be endowed of the principal Messuage, if it be not a Castle; and of Things whereof no Division can be made, the Dower must be assign'd in a special Manner; as the third Presentation to a Church, &c.

The Wife of one who held Lands as Tenant in common with another, tho' not of a Joint-Tenant, shall have Dower; and she shall hold her Part in Common with the other Tenants.

On a Tenant in Tail's dying without Issue, whereby the Land reverts to the Donor, and the Estate-Tail is determined, a Woman may be endowed thereof. *Roll. Abr.*

And a Devise of Lands by the Husband to his Wife by Will, is held to be no Bar of her Dower, but a Gift or Benevolence; and therefore she may enjoy both.

For Dower is much favoured in Law, being for the Benefit of Widows; and therefore tho' the Husband be convicted of Felony, &c. the Widow shall have her Dower: But not if he be attainted of Treason; nor the Wife of an Alien. *2 Inst.*

If a Wife commits either Treason or Felony; or in case she elopes from her Husband, and lives willingly with the Adulterer, she shall forfeit and lose her Dower.

Yet 'tis otherwise if the Husband be afterwards reconciled to her, and she returns to him again, for then she shall be endowed.

Altho' a Man grants his Wife over to another, and she by Force of the C live with the Grantee, during the Life of the H her Dower becomes forfeited.

Such a Grant is void, and the Wife lived in Adultery notwithstanding.

A Wife

Of Marins and General Rules. 71

A Wife levies a Fine with her Husband, she thereby bars herself of Dower. 2 *Dantvers Abr.*

There are **Jointures** usually made by the Husband of great Estates, in Lieu of Dower, by Virtue of the Statute 27 *Hen. 8.*

And a Jointure is contrived for the Wife, to take Effect presently in Possession or Profit, after the Death of the Husband, for her own Life; and it must be made in Satisfaction of her whole Dower, and be so expressed; it may be also made either before or after the Marriage.

In Case the same be made before Marriage, the Wife cannot waive it and claim Dower; but if made after Marriage, it is waveable, for then she may refuse the Lands appointed in Jointure, at the Husband's Death, and have her Dower. 1 *Inst.*

If the Wife be evicted of her Jointure, she shall be endowed according to the Rate of the Husband's Lands, whereof she was dowable at Common Law.

A Wife at the Death of her Husband may enter on her Jointure, without bringing an Action; and a Jointure is not forfeited by the Treason of the Husband, as in Cases of Dower.

6. The **Estate for Life**, is where a Person holds Lands or Tenements let or granted to him for his own Life, or the Life of some other Person; on which Lease or Grant, Livery of Seisin is made;

This Estate may be made both for a Man's own, and another's Life; but that for his own, is greater than for another's: And it is a Freehold Estate, tho' accounted the least in the Law. *Littleton's Ten.*

If a Lease be granted to a Man and his Assigns, to hold the Land during his Life, and the Lives of two other Persons; he hath but one Estate for his own and the other two Lives, and it is good with such Limitation.

But where a Person grants Land to one, to hold to him and also to two others for their Lives, none can take but the first Person, because he is only Party to the Deed, and the Rest are only named in the *Habendum*, and not the Grant. *Raymond.*

72 Of Marins and General Rules.

By the Common Law a Lease for Life cannot be granted to commerce at a Day to come; because Livery and Seisin may not be made to any future Estate.

Yet if after the Day the Lessor make Livery it will be good; and a Lease for Life in Reversion, or for Years, may be made to begin at a future Day. 1 *Co. Inst.*

Where a Grant or Lease is made for Life or Years, as the Timber-Trees are annexed to the Land, the Lessee has only a Special Interest therein, to have the Mast and Shadow for his Cattle.

And when they are severed from the Lands, or blown down with the Wind, the Grantor or Lessor shall have them as Parcel of his Inheritance. 11 *Rep.*

But if an House or Part of it falls down, the Lessee hath an Interest to take the Timber to re-edify it; and every Tenant for Life, or Years, may cut of Timber or Wood upon the Lands demised, necessary *House-bote*, and *Plough-bote* for Repairs, *Fire-bote*, &c. Without doing Waste.

These are called *Eftovers* in the Law, and are incident to the Estates of the Lessees, if no Mention be made thereof in their Grants. 1 *Inst.*

In Case any Tenant for Life of an Estate remain beyond the Seas, or elsewhere absent himself for the Space of seven Years together, and no sufficient Proof is made of his being alive, in any Action brought by the Lessor or Reversioner he shall be taken as dead. 19 *Car. 2.*

And by another Statute, if a Lessee for Life be not produced, on moving the Lord Chancellor to that Purpose, and Affidavit being made by those in Remainder, &c. that they believe he is dead, they may enter upon the Estate. 6 *Ann.*

If a Lease or Grant of an Estate be made for the Term of one thousand Years, it is only a Chattel and no Freehold, nor of so high a Nature as an Estate for Life.

7. The *Estate for Years*, is when Lands or Tenements are let to another Person, for a certain Term or Number of Years.

Where a Tenant for Life, and he in Remainder in Fee grant an Estate for Years; it is the Lease of the Tenant

Of Marins and General Rules. 73

nant for Life, so long as he lives, and the Confirmation of him in Remainder.

And after the Tenant for Life's Death, it will be the Remainder Man's Lease or Grant for the Rest of the Term. *Dyer.*

A Man having an Estate for Years in Land, in Right of his Wife, makes a Lease thereof to commence after his Death; and then dies; tho' the Wife survive him, this has been held good against her.

For the Husband during his Life might have sold the whole Term which his Wife had in the Lands, or any Part thereof; but she shall have so much as is undisposed of by him. *I Inst.*

If the Estate of Lessee for Years ends before Corn or Grain is ripe, the Landlord or he in Reversion will be intitled to it; but 'tis otherwise in Case Lessee for Life dies, the same shall go to his Executors; and if the Estate of Tenant at Will be determined by the Lessor, such Tenant may have the Grain. *5 Rep.*

In the Case of the Lessee for Years, it was his own Folly to sow the Land, when he knew his Term would expire before the Corn could be ripe; but it is not so in the Case of a Tenant for Life, &c. He knew not certainly the Determination of his Estate, and if the Law were otherwise it would be a Discouragement to Husbandry.

A Tenant for Years is immediately to enter on the Lands let, and he is not in Possession to bring an Action of Trespass, until actual Entry. *See more Lease.*

8. The **Estate held at Will**, is where Lands are let to any Person, to hold at the Will of the Lessor; or of both Parties, the Lessor and Lessee.

In Case a Person enters into Land by the Owner's Consent, he is Tenant at Will; so it is if a Man be in Possession, and has paid any Rent to the Landlord, altho' there was no Agreement between the Owner of the Land and the Tenant. *Lilly Abr.*

But a Tenant at Will is not obliged to repair the Premises, as the Lessee for Years is; tho' if he commits voluntary Waste, an Action of Trespass lies against him.

74 Of Marins and General Rules.

By the Lessor's Entry on the Land, in the Absence of the Lessee, the Estate is determined; and this may be done off from the Lands by Words, on giving the Lessee Notice.

Tho' if a Lessor determines the Will, within a Quarter, he shall lose that Quarter's Rent, and if the Lessee doth it, he must pay a Quarter; for it should be on the very Day of Payment of the Rent. *1 Co. Inst.*

If the Tenant at Will grants over his Estate to another; or if the Lessor dies, the Lease will be determined.

And then if a Person continues in Possession, he becomes Tenant at *Sufferance*. *2 Salk.*

9. The **Copyhold Estate**, that is held by *Copy of Court Roll*, is an Estate in Lands and Tenements, which Tenants have had Time out of Mind, to them and their Heirs in Fee, or for Lives, at the Will of the Lord, according to the Custom of the Manor.

This is called a *Base Tenure*, because in former Times the Copyholder held only an Estate at Will, in Judgment of Law; but now by the Custom of Manors, these Estates are descendible, and the Heirs of the Tenants shall inherit them. *Littleton.*

Yet Copyholders may not plead, or be impleaded for any Thing relating to their Tenements, by the King's Writ, but they are to enter a Plaintiff in the Lord's Court; unless the Lord pretend to expel them out of their Estates.

In which Case they may sue a *Subpœna* out of the Chancery to be relieved, or have Action of Trespass against the Lord. *1 Inst.*

It is by Surrender and Admittance, that Copyhold Estates regularly pass from one to another:

A Copyholder cannot transfer his Interest to a Stranger, in any other Way than by Surrender to the Lord, according to the Custom, to the Use of him that is to have the Estate.

If a Man would exchange, or devise his Copyhold Estate, it must be done by Surrender; the latter to the Use

Of Marins and General Rules, 75

Use of his Will: And otherwise the Land goes to the Heir at Law. 4 Rep.

And a married Woman may receive a Copyhold by Surrender from her Husband, because she comes not in immediately by him; but on the Admittance of the Lord.

Upon a Surrender, the Person to whom made is to be admitted Tenant, and the Party making it, continues Tenant till the Admittance of the Surrendree; but he cannot pass away the Land, or subject it to any other Incumbrances, but those at the Time of the Surrender.

Till Admittance, which is the giving of Possession, the Copyhold Tenant hath not an Estate in the Lands, which he may surrender to another; except in the Case of an Heir by Descent.

A Surrender made out of the Lord's Court is to be presented at the next Court; and if the Surrenderor or Surrendree die before 'tis presented, in that Case a Presentment afterwards makes it good.

If the Tenants refuse to present a Surrender thus made, they are compellable to it in the Court of the Lord. Croke Eliz.

There are Fines payable to the Lord on all Admittances in Fee; and on the Death of a Copyholder for Life, a *Heriot* of the best Beast or Goods is due to the Lord, according to Custom.

And if the Heir on the Death of his Ancestor, do not come in to be admitted, upon three Proclamations made in Court, he may forfeit his Estate. But see Stat. 7 Geo. 1.

By Custom, the Widow of a Copyholder in Fee may have her *Free Bench*, after the Death of her Husband; and there is also a *Widow's Estate* annexed to the Copyhold for Life.

Tho' it is held, if the Copyholder surrenders to the Use of another, and then dies, the Surrendree shall have the Land, and oust the Widow of her Estate. 1 Salk.

Copyholds are not within the *Statute of Jointures*, or of *Uses*; nor shall be extended in Execution for Debt; for they are not Assets to bind the Heir, &c.

76 Of Maxims and General Rules.

And yet they descend according to the Rules and Maxims of the Common Law.

See the Maxim, *Consuetudo Manerii & Loci, &c.*

General Rules concerning Deeds and Conveyances of Lands.

1. The **Deed of Feoffment**, is a Grant or Conveyance of any Manors, Messuages, Lands or Tenements to another in *Fee*, that is, to him and his Heirs for ever, by the Delivery of *Seisin* and Possession of the Estate granted. *Litt.*

A Feoffment is the most antient Conveyance of Lands at Common Law; and is said to excel a Fine and Recovery, for it clears all Difeisins, Abatements, Intrusions, and other wrongful Estates.

And which neither Fine, Recovery, nor Bargain and Sale by Deed indented and inrolled does.

It also bars the Feoffor from all collateral Benefit, in Respect to Conditions, Powers of Revocation, Writs of Error, &c. and destroys contingent Uses. *Plowden.*

But no Deed of Feoffment is good to pass an Estate without Livery of Seisin; so that if either of the Parties die before Livery, the Feoffment is void.

If a Bargain and Sale of Lands be not inrolled, and the Bargainor delivers Livery and Seisin of the Land, according to the Form of the Deed, it has been held to be a good Feoffment. *Pepham.*

Tho' where one makes a Feoffment, without any Consideration of Money, &c. by that the Estate passes, but not the Use, which shall descend to the Feoffor's Heir. *1 Leon.*

Since the Statute of Uses, the Deed of Lease and Release has taken Place of this Deed, as it unites the Use and Possession, without Entry. *27 H. 8.*

The Terms of *Parties* in Deeds, are Feoffor and Feoffee, Grantor and Grantee, Bargainor and Bargainee, Lessor

Of Maxims and General Rules. 77

Lessor and Lessee, Devisor and Devisee, Obligor and Obligee, &c.

2. The **Deed of Lease and Release**, as used in our Law, signifies a certain Instrument in Writing for the Conveyance of a Man's Right or Interest in Lands and Tenements in Fee to another Person, who hath Possession thereof.

A Lease and Release make but one Conveyance, being in Nature of one Deed; and it amounts to a Feoffment, the Use drawing after it the Possession, and supplying the Place of Livery and Seisin, required in that Deed.

This Deed is now the usual Conveyance of Lands or Tenements; in the making whereof, a *Lease* or Bargain and Sale for a Year, bearing Date the Day next before the Day of the Date of the Release, is first prepared and executed.

To the Intent that by Virtue thereof, and of the *Statute* made for transferring Uses into Possession, the Lessee may be in the actual Possession of the Lands, &c. intended to be granted by the Release, and be thereby enabled to take a Grant of the Reversion and Inheritance of the said Lands, to him, his Heirs and Assigns for ever.

On which the Release must be executed, reciting the Lease or Bargain and Sale for a Year, and declaring the Use. 27 Hen. 8.

The Lease for a Year, different from other Leases, must have the Words *Bargain and Sell* in Consideration of a Sum of Money; and 5 s. tho' never paid, is a good Consideration, whereby the Lessee for a Year becomes immediately in Possession, on executing the Deed, without any Entry made.

And it is held, if only the Words *Demise, Grant, and to Farm Let*, are used in the Lease or Bargain and Sale for a Year, in that Case the Lessee cannot accept of a Release of the Inheritance, until he has actually entered and is in Possession. 2 *Lilly Abr.*

'Tis proper in the Lease for a Year to reserve a Pepper-Corn Rent, which is judged sufficient to raise a Use; so as to make the Lessee capable of a Release.

The

78 Of Marriages and General Rules.

The Person who makes the Release, must not only have such an Estate in himself, whereout the Estate may be derived to the Releasee;

But also the Releasee is to have an Estate in Possession, that is, in Deed or in Law, in the Land of which the Release is made, as a Foundation for this Release.

And there must be sufficient Words to make the Release, and to create and raise a new Estate, or it will not be good. *1 Inst.*

A Release made by a Person, who at the Time of making thereof, has no Right to the Lands; or if it be made to a Man, who at that Time hath nothing in the Lands, is void in Law.

For he ought to have a Freehold therein, or a Possession, or Privity; and without Privity between the Tenant in Possession and the Releasor, a Release will not operate. *Noy.*

These Releases that enure by way of passing an Estate, may be made upon a Condition, &c. so as it be contained in the same Deed, or delivered at the same Time with it. *1 Mod.*

3. The Conveyance by **Fine** and **Recovery**; and first a **Fine** is a final Agreement or Conveyance upon Record, for the Settling or Assuring of Lands or Tenements, and is acknowledged in the King's Court by the Cognizor to be the Right of the Cognizee, the Person to whom the Acknowledgment is made.

'Tis observed that this Fine is commonly upon a feigned Action on a Writ of Covenant, &c. and supposes some Controversy, when in Fact there is none; and this is done to secure the Title that a Person has in his Estate against all others.

Or it is to cut off Intails, so that Lands may with the greater Certainty be conveyed, either in Fee, Tail, for Life or Years. *West's Symb.*

And as a Fine for its better Credit is supposed to be made in the Presence of the King, being levied in his Court of *Common Pleas*; it therefore binds married Women, who are Parties, and others whom the Law generally disablers to act.

Of Marriages and General Rules. 79

But where a Feme Covert is Party, she is to be secretly examined, by the Judge or Commissioner that takes the Fine, whether she consents freely thereto, and otherwise the Fine cannot pass. 3 Rep.

A Fine is either *Single*, or *Double*, which may be with a *Render* back again of the Lands; and Fines are with Proclamations according to the Statutes, or without them at Common Law; but those by Statute are the best and most used.

There are likewise four Sorts of Fines; tho' the Fine *Sur Cognizance de Droit comme ceo, &c.* is the principal and surest Kind of Fine, as it gives present Possession to the Cognizee, without any Writ of Execution: And this is a Fine according to the Statute. 2 Inst.

Upon levying a Fine, the Privies in Blood, as the Heirs of the Cognizor, are barred presently thereby.

But Strangers to the Fine who are not Parties or Privies, have five Years Time allowed them to enter on the Lands, &c. and claim their Rights.

The like Time is given to Infants, after they come to full Age, and to Feme Coverts, not joining in the Fines, after the Death of their Husbands; also to Prisoners after they are set at Liberty, and Persons out of the Realm on their Return, &c. Plowden.

And a future Interest cannot be barred by a Fine, till five Years after its coming in esse; as in Case of a Reversion or Remainder in Lands.

A Person that has two Titles, shall have two five Years to make his Claim; and where there is no present nor future Right in Land, &c. but only a Possibility at the Time of levying the Fine, a Man may enter and claim when he pleases. 10 Rep.

In Case one does levy a Fine of another's Lands, while he is in Possession, or being let to his Tenant, this Fine shall not hurt or affect him.

A Man seised of an Estate in Fee-Simple, Fee-Tail, or in Remainder or Reversion, may levy a Fine thereof.

So may a Tenant for Life, to hold the Land to the Cognizee during the Life of such Tenant; but a Person who

80 Of Marins and General Rules.

who is only Tenant for Years, cannot levy a Fine of his Term, unless he have a greater Estate.

If a Person who is Tenant for Life of Lands grants a greater Estate therein by Fine, than for his own Life, his Estate will be forfeited, of which he in Remainder, &c. may take present Advantage. *Dycr.*

Lands bought of divers Persons, by several Purchasers, may pass in one Fine; but in that Case the *Writ of Covenant* is brought by the Vendees against all the Vendors, and every Vendor *warrants* against him and his Heirs.

On a Fine Uses may be raised and created, &c. declared by *Indentures* made before or after levying the Fine.

And the usual Fine bars the Issue in Tail, and not those in Reversion or Remainder, but a Recovery cuts off all. *2 Levinz.*

A *Recovery*, is a formal Act by Consent, made Use of for the better Assurance of Lands and Tenements.

And the End and Effect of this Recovery, called in the Law a *Common Recovery*, is to dock and destroy Estates Tail, Remainders and Reversions, and bar the former Owners thereof. *1 Co. Inst.*

A Common Recovery may be with single, double or treble Voucher, and accordingly bars: And to a Recovery, there must be three Parties at least, the Demandant, Tenant and Vouchee.

The *Demandant* is the Person that brings the *Writ of Entry*, and therefore may be termed the *Recoveror*: The Tenant is he against whom the Writ is brought, termed the *Recoveree*; and the *Vouchee* is the Party whom the Tenant vouches and calls to Warranty for the Lands demanded.

In prosecuting a Recovery there is a colourable Suit, or Action Real brought by the Demandant, who is usually some Friend of the Person having the Estate, and he by a feigned Count or Declaration pretends he was dispossessed of the Land, by the Tenant.

Then the Demandant is supposed to come into Court, and this feigned Tenant, if it be a Single Recovery, is made to appear and vouch to Warranty the *Bag-bearer*

to

Of Maxims and General Rules. 81

to the *Custos Brevia*, who is called the *common Vouchee*, and is supposed to warrant the Title.

And this Vouchee appears, as if he intended to defend the same ; and for that End craves a Day for making his Defence, but on the Day given he makes Default, so that the Plaintiff or Demandant has Judgment to Recover the Land against the Tenant or Defendant, and he to recover in Value against the common Vouchee ;

On which there goes out a *Writ of Seisin* for the Possession of the Lands. *Doctor and Stud.*

In Case the Recovery be with double, or treble Voucher, then by Fine, Feoffment, or Leafe and Release, the Estate must be discontinued, and a *Tenant of the Freehold* made of the Land ; and thereupon the Practice is to bring a Writ against that Tenant, and he is to vouch the Tenant in Tail, and he the common Vouchee.

Whereupon Judgment is given for the Demandant against the Tenant, and for the Tenant to recover in Value against the Vouchee, and so the first Vouchee against the second, &c. as the Recovery is brought. *10 Rep.*

These Recoveries are much favour'd in Law, many of the Inheritances of the Kingdom depending upon such Kind of Assurances ; and they suppose a Recompence in Value to all Persons that lost the Estate : But the Recovery in Value is only imaginary, and yet it is a Bar to the Intail for ever.

Where there is a Tenant for Life, with Remainder in Tail, and Remainder or Reversion in Fee ; if the Tenant for Life be impleaded by Agreement, and he vouches the Tenant in Tail, who vouches over the common Vouchee ;

This bars the Remainder or Reversion in Fee, tho' he in Reversion or Remainder never assented to the Recovery. *1 Co. Rep.*

But if Tenant for Life alone suffers a Recovery, without the Consent of him in Remainder, it is no Bar : Also a Recovery, tho' well suffered, bars only where there is a Privity in Law ; that is the Issue, and he in Remainder, and Reversion, &c.

It shall not bar the Heir, who claims as a Purchaser, and not by Descent ; and a Stranger is not barred by a Recovery,

82 Of Maxims and General Rules.

Recovery, and Non-claim, as in Case of a Fine.
3 Rep.

On suffering a Recovery, a Person may sell and dispose of his Estate as he pleases ; but either a Fine or Recovery may be avoided on Account of Error, or by Reason of Fraud and Deceit, &c.

By Statute Recoveries are held to be good, without Conveyances from Lessees to make Tenants to the Writ of Entry, &c. so as such Tenants have conveyed to them an Estate for Life at least.

Purchasers having been in Possession of the Lands twenty Years, may produce Deeds making a Tenant for suffering any Recovery, and declaring the Uses, which shall be allowed to be Evidence of it, tho' not regularly entered on Record.

And after that Space of Time, all Recoveries are deemed valid, if it appears there was a Tenant to the Writs, and the Persons had an Estate sufficient to suffer them, notwithstanding the Deeds are lost. 14 Geo. 2.

4. The **Deed of Bargain and Sale**, is a Deed or Conveyance whereby the Property of Lands and Tenements is, for good and valuable Consideration, granted and transferred from one Person to another.

'Tis called a real Contract, where a Recompence is given by both the Parties to the Bargain ; as if one Bargain and Sell his Land to another Person for Money, the Money in that Case is a Recompence to him for the Land, and the Land to the other for the Money. 1 Lilly.

And if Money is mentioned to be paid in a Bargain and Sale, and in Truth none is ; some Authors say, it may be a good Deed of Bargain and Sale, because no Averment lies against that which is expressly affirmed in the Deed ; except it be questioned as fraudulent. Dyer.

Yet where a Deed expresses a Consideration upon a Purchase, others hold this will be no Proof upon a Trial that the Money was actually paid ; but the same must be made out by Witnesses. Style.

A Bargain and Sale of Lands in Fee, is to be by Deed indented and inrolled in one of the Courts at Westminster, or

Of Maxims and General Rules. 83

or in the County where the Lands lie, before the *Custos Rotulorum*, and Justices of Peace.

And the Inrollment must be made within six Months after the Date of the Deed, to be accounted at twenty-eight Days to the Month.

But this extends not to Bargains and Sales for Terms of Years, &c. for they are good tho' not inrolled, nor by Deed indented. 27 H. 8.

The Death of either the Bargainor or Bargainee, before the Inrollment of this Deed, will not hinder the Passing of the Estate.

But the Freehold is in the Bargainor until it is inrolled, and therefore the Bargainee may not bring Action of Trespass before Entry had; yet 'tis said he may Surrender or Assign his Interest. 1 Co. Inst.

By the Statute of Inrollments, the Estate shall not vest, except the Deed be inrolled; but this being done, it settles and vests from the Beginning, according to the Statute of Uses.

Where a Bargain and Sale of Land is made, it passes the Freehold of the Lands, and also Reversions and Remainders, without Livery and Seisin.

Tho' in general no Person can make such Deed of Bargain and Sale, that has not the Possession of the Land, at the Time of the Sale: For if he be not in Possession, nor receives the Rents; to make it good, there ought to be Livery, and the Deed is to be sealed on the Lands. 8 Rep.

There is a **Bargain and Sale of Goods**, which a Person may at any Time Sell, even tho' an Execution be coming out against him; unless there is a private Trust between the Parties, and the Writ of Execution is delivered to the Sheriff. Noy.

But a Sale of Goods upon a *Sunday* will not alter the Property; and a Contract for the Sale of Goods, for 10*l.* or upwards, shall not be good, except the Buyer receive Part of the Things sold; or gives something in Earnest to bind the Bargain; or some Note thereof be made in Writing signed by the Party, &c. 29 Car. 2.

An Agreement for the Sale of Lands must be in Writing, and be signed by the Seller, or it will not be binding;

84 Of Marriages and General Rules.

ing ; tho' a Guinea or other Money be given in Earnest.

On any Bargain or Contract, where there is not what is called *Quid pro quo*, it is void in Law, and termed a *nude Contract* : But if the Sum given be ever so small, the Contract is good.

And if a Contract or Bargain be to pay Money to another at a Day to come, and he dies before, it shall go and be paid to his Executors, or Administrators. *Dyer.*

5. **Deeds of Gift and Grant** ; a Deed of *Gift* is a Conveyance or Instrument, by which Lands and Tenements or Goods are passed from one to another.

And a *Gift* is of a larger Extent than a *Grant*, it being applied to Things moveable and immoveable ; this Deed is also good, without any Consideration : But great Care must be taken that there be no Fraud in making it.

For if a *Gift* and Conveyance of Lands be made with Intent to defraud a Purchaser on good Consideration, as against such Purchaser it shall be deemed void.

And the Parties justifying the same to be *bona fide* made, shall forfeit a Year's Value of the Lands, &c. and be likewise imprisoned. *27 Eliz.*

So it is where any Deed of *Gift* or *Grant* is made, of Lands or Goods, to deceive Creditors of their just Debts, as to the Creditors it is void in Law ; but not against the Party himself that makes the Deed, or his Executors, &c. against whom it remains good. *1 Inst.*

A general Deed of *Gift* of all a Man's Goods, is liable to Suspicion of being fraudulent, tho' a true Debt be owing to the Party to whom made ; and it is void against other Creditors.

And the several Marks of *Fraud* in Law, are if a *Gift of Goods* be general ; if the Donor continues to possess and use the Goods ; if the Deed be made in secret ; or upon any implied Trust and Confidence ; or if done whilst an Action is depending. *3 Rep.*

Therefore whenever a *Gift* is made in Satisfaction of a Debt, it is proper to have it done in a publick Manner, before Witnesses of Credit ; and that the Goods and

Chattels

Of Marriages and General Rules. 85

Chattels at the same Time be apprais'd to the full Value.
Hobart.

In some Cases, there is a *Gift in Law*; as where a Person is made Executor of a Will, or marries a Woman, the Law in the one Case gives him the Testator's Goods, and in the other Case the Goods of the Wife, liable to satisfy Debts. *1 Co. Inst.*

A *Grant*, is a Conveyance in Writing of such incorporeal Things as lie in Grant, and not in Livery; and Grants are made by Persons who cannot give but by Deed.

Here the Things grantable are Reversions, Advowsons in Gross, Tithes, Rents, Services, Commons, and such like; but generally we say Land is granted in any Deed, and the Words *Give* and *Grant*, &c. of what lies in Grant, will amount either to a *Gift*, *Grant*, *Feoffment* or *Release*, &c.

There must be a Foundation of Interest in Grants, or they will not be good; and the Law does not allow of a Grant of Titles only, or imperfect Interests, or of Rights as are merely future. *Bacon.*

A Grant shall be taken in Favour of the Grantee; also the Grantee himself is to take by the Grant, and not a Stranger: In Case Lands are granted by Deed, the Houses that stand thereon pass to the Grantee.

And by the Grant of all the Lands, the Woods will pass; but Trees in Boxes, &c. do not pass in such a Grant, because they are separated from the Freehold. *1 Inst.*

In every Grant there must be a Grantor or Person able to grant, and a Grantee capable of the Thing granted, something granted as is grantable, it is to be done in the Manner the Law requires, and there must be an Acceptance of the Grant by him to whom made.

One attainted of Treason or Felony, may make a Grant, and it shall be good against all Persons but the King, and the Lord of whom the Land is held; and against them too for his Relief in Prison.

If any Grants are made by Persons *Non sanc*Memori*, they are good, as to themselves, but voidable by their Heirs, &c. and tho' Infants, and Feme Coverts, are not capable to be Grantors, yet they may be Grantees;***

But

86 Of Marriages and General Rules.

But subject to the Disagreement of the Husband to the Grant made to his Wife, and of the Infant to his Grant at his full Age. *Perkins.*

Where there appears to be Incertainty, or Impossibility in Grants, or when they are against Law, they are judg'd void.

6. A **Lease of Lands, &c.** is a Demise or Letting of Lands or Tenements to another for Term of Life or Years, under a *Rent* reserved.

All Leases that exceed three Years, are to be reduced into Writing; and if the Substance of a Lease be put in Writing, and signed by the Parties, tho' it be not sealed, it shall have the Effect of a Lease for Years. 29 Cqr. 2.

And where a Lease is sealed by the Lessor, but the Lessee hath not sealed the Counterpart; the same is binding, so as an Action of Covenant may be brought against the Lessor upon the Lease. *Coven.*

If Articles of Agreement only are made, with Covenants to make a Lease for a Term certain, at and under so much Rent, this implies a Lease, and has been so adjudged.

Also the Words to *have* and *possess* Lands, in Consideration of yearly Rent, will make a Lease of the Land; and a Licence to occupy and take the Profits, &c. amounts to a Lease. *Crroke Eliz.*

Leases may be made for any Number of Years, or Months, &c. But the Term must have a certain Commencement, and Determination; and if by Reference to a Certainty, it may be made certain, the Lease will be good.

A Lease is frequently granted for twenty one Years, if the Lessee shall so long live, and is good, tho' it contains a Certainty in an Uncertainty.

One makes a Lease from three Years to three Years, it is good for six Years; but where a Lease is made in Writing for a Year, and so from Year to Year, as long as both the Lessor and Lessee shall agree, this is binding but for a Year.

Yet if the Lessee does enter upon the second Year, he thereby becomes bound to hold the Land, &c. that Year. *Mod. Cas.* It

Of Maxims and General Rules. 87

It is a *Maxim* in Law, that *Rent on Leases* must be reserved to him from whom the Land moveth ; as the Lessor, or his Heirs, &c.

If a Lease is made for Years of Lands in Fee Simple, rendering Rent to the Lessor, his Executors or Assigns, during the Term ; the Heir shall have the Rent as incident to the Reversion.

So where the Lessor dies before the Day of Payment of Rent, it shall go to his Heir ; but when it grows due in the Lessor's Life-time, it goes to his Executors. 10 Co. Rep.

Here it is said the Rent is not due till the last Minute of the Day ; for which Reason, if the Lessor die upon the Day whereon payable, and Rent is unpaid, his Heir shall have it.

And yet if it be paid that Morning, before the Lessor dies, his Executors shall retain the same.

In Case a Person makes a Lease of Lands, yielding Rent at such a Feast, or within one Month after ; and the Lessor dies between the Feast-Day and the End of the Month, the Rent must be paid to the Heir, and not the Executor ; because until the Month's End it was not due. 1 Saunders.

If a Tenant for Life dies on the Day on which the Rent was reserved to be paid, his Executors, &c. in an Action upon the Case may recover the whole Rent of the Under-tenants ; or if he die any Time before such Day, a due Proportion thereof. Stat. 11 Geo. 2.

Leesees that hold over Lands after the Expiration of their Terms, shall pay double Rent ; and when half a Year's Rent is due from any Tenant, and no Distress can be found on the Lands, the Lessor or Landlord may serve an Ejectment on the Land, and have Judgment to recover, &c.

But a Lessee in such Case may within six Months after file his Bill in Equity, and be relieved thereon. 4 Geo. 2.

And if a Tenant in Arrear one Year's Rent, shall desert and leave the Premises, two Justices of Peace, at the Landlord's Request, may enter upon and view the Lands,

88 Of Matings and General Rules.

Lands, &c. And if on Notice fixed by them, the Tenant does not return and pay the Rent, his Lease shall become void. 11 Geo. 2.

A Person of common Right may distrain for Rents, tho' there be no Clause of *Distress* in the Leafes, so as he have the Reversion of the Lands. 1 Inst.

The Distress for Rent is to be taken on the Land chargeable therewith; and it must be made of such Things whereof the Sheriff may make Replevin, and deliver in as good Condition as at the Time of the Taking. *Roll. Abr.*

Any goods may be taken in Distress, as well as Cattle; another's Goods in the Tenant's House, and Beasts of a Stranger in the Landlord's Ground, being Levant and Couchant, and having well rested themselves there, may be likewise distrained. 2 Inst.

For the Land is Debtor for the Rent, and the Landlord need not enquire whose Cattle they are that he finds therein.

Where Goods or Chattels shall be distrained for Rent reserved upon any Lease or Contract, if the Goods are not replevied by the Tenant within five Days after such Distress, and Notice thereof, they may then be appraised by two sworn Appraisers, and sold by the Person distraining, with the Under-Sheriff, or Constable of the Place, &c.

An Inventory is taken of the Goods distrained in the Presence of Witnesses; and the Constable, &c. must swear the Appraisers, to appraise them truly; and the Debt being satisfied by the Sale, the Overplus of the Money, if there be any, is to be left in the Constable's Hands, for the Owner's Use. 2 W. & M.

If any Tenant fraudulently carries away his Goods, to prevent a Distress, the Landlord within thirty Days after may distrain them, wherever they are; and the Tenant and Persons assisting in the Fraud, shall forfeit double the Value of the Goods.

And where such Goods are concealed in any House or Place, on Oath made of reasonable Ground of Suspicion before

Of Marins and General Rules. 89

before a Justice of Peace, by his Warrant the House may be broke open to distrain them.

The Landlord may also distrain any Cattle of the Tenant's feeding on Commons, or Corn, Grass, or Fruits growing on the Lands, and cut, gather, cure and dispose of the same, &c.

This is in Case the Tenant does not before pay the Rent, and all Costs and Charges. 11 Geo. 2. cap. 19.

On a Rescous of Goods distrained, treble Damages and Costs may be recovered against the Offenders, by Action on the Case.

And if any Distress or Sale be made, where no Rent is due, the Owner of the Goods distrained may by an Action of Trespass recover of the Persons distraining, double the Value and full Costs.

7. The **Deed of Mortgage**, is a conditional Conveyance of Lands or Tenements, &c. as a Security for Money borrowed.

It is called *Mortgage*, because the Lands are as a *Dead Pledge*, until the Money borrowed is repaid; or for that if the Money be not paid at the Day, the Land dies to the Debtor, and is forfeited to the Creditor. *Lit.*

And Mortgages may be made in several Ways; as by Lease for a long Term, Lease and Release, or Assignment, &c. but they are commonly made by Lease for five hundred Years, wherein a Pepper-Corn Rent is reserved.

In which Deed there is contained a *Proviso* or Condition, that if the Money is paid at the Day agreed, the Deed shall cease and be void.

And here until Failure be made in Payment, the Mortgagor holds the Lands; but if Failure is made, on which the Mortgagee enters on the Land, yet the Mortgagor has an *Equity of Redemption*, and may call the Mortgagee to an Account for his Receipt of the Profits.

1 Inst.

Likewise the Mortgagee, if he be minded to bar the *Equity of Redemption*, may call the Mortgagor to Account, either to pay what is due, or be foreclosed of his *Equity of Redemption*; which the Court of Chancery will

90 Of Marins and General Rules.

will generally order: Though upon the Mortgagor's paying the Interest of the Money, these Mortgages often continue a long Time.

The Right or Interest in Lands mortgaged is by Law in the Mortgagee before Forfeiture; he has purchased the Land as it were upon a valuable Consideration, as the Law will intend.

For tho' the Mortgagor may redeem, yet it is not certainly known whether he will do so or not; and if he does not, the Estate becomes absolute in the Mortgagee, who is esteemed in Possession on executing the Mortgage. 2 *Lilly Abr.*

Therefore if the Money be not paid, whereby the same is forfeited, the Mortgagee may bring an Ejectment without actual Entry.

As the Mortgagor's Heir, is interested in the Condition, he may pay the Money, and save the Forfeiture; and so may Executors, &c. And it is held that Mortgages are a Part of the Personal Estate, if it be not otherwise declared by a Mortgagee in Fee.

The Personal Estate of the Mortgagor, shall also in Favour of the Heir, be applied to pay the Mortgage, where there are Assets besides for the Payment of all Legacies. 2 *Ventr. 1.*

In Case Lands are thrice mortgaged, it has been ruled in Equity that the third Mortgagee may buy in the first Incumbrance, and thereby shall hold against the second Mortgagee.

But that is, unless such second Mortgagee shall satisfy the Money paid by the third Mortgagee to the first, and also his own which he lent on the last Mortgage.

And where Persons having once mortgaged Lands, do mortgage the same a second Time, without discovering the first Mortgage, their Equity of Redemption will be forfeited, and the second Mortgagee may redeem, &c. by Statute 4 & 5 W. & M.

When any Action of *Ejectment* is brought for recovering Land, &c. mortgaged, and there is no Suit in Equity for foreclosing or redeeming it, if the Person intitled to redeem, shall, pending the Action, bring the Principal

Of Marins and General Rules. 91

Principal and Interest due, with Costs, into Court, it shall be taken as a full Satisfaction of the Mortgage.

And the Mortgagee shall thereon be obliged to reconvey the Land to the Mortgagor, and deliver up all Deeds.

7 Geo. 2.

8. The **Deed of Surrender**, is an Instrument whereby a particular Tenant of Lands, &c. for Life or Years, does yield and give up his Estate, to the Person who has the immediate Reversion or Remainder, so that he may have the present Possession thereof. 1 Co. Inst.

There is likewise a Surrender without Deed, called a Surrender *in Law*; as where a Person has a Lease of a Term, and during the Term of his Lease takes a new Lease of the same Lands, it will be a Surrender in Law of the former Lease.

And this Surrender shall take Effect, tho' the second Lease be for a less Term than the first; and altho' it is made upon Condition, or be a voidable Lease, for both the Leases cannot stand together in one Person. 5 Rep.

A Lease is made for Years, to commence at a future Day, this Interest may not be surrendered by Deed; but if the Lessee before the Day does accept of a farther Lease of the Land, thereby the first Lease becomes surrendered in Law.

And thus the Surrender wrought by Operation of Law, is of greater Efficacy than that made by Deed, entered into by the Party. 6 Rep.

In the making a Surrender, the Surrenderor must have an Estate in Possession of the Lands surrendered; the Surrendree is to have a higher or greater Estate in his own Right, than the Surrenderor hath in the Land, that the Surrenderor's Estate may be drowned therein; and he must be sole seised of his Estate in Reversion, &c. 2 Rolls Abr.

A Surrender may be absolute, or conditional, and be to a Use; but it cannot be made of an Estate in Fee, by the Common Law; nor may one Termor regularly surrender to another.

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92 Of Marriages and General Rules.

If a Lessee for Life surrenders to one in Remainder for Years, it is void. *Croke Eliz.*

9. A **Will**, or **Last Will and Testament**, is a solemn Instrument in Writing, whereby a Person declares his Mind and Intent, as to the Disposition of his Lands, Goods or other Estate, or of what he would have done after his Death. *Litt.*

In a Will where Lands are given, the Gift is called a **Devise**; but when Goods and Chattels are given, they are termed a **Legacy**: And in a Will of Goods there must be an **Executor** appointed, but he has nothing to do with the Freehold Lands. *1 Inst.*

All Persons that have a sole Estate in Fee-Simple, of any Lands or Tenements, may devise and give away the same by Will to whom they think fit; and this extends to Persons seised in Coparcenary, or as Tenants in common. *35 H. 8.*

Lands intailed are not devisable, only those held in Fee, and Goods and Chattels; and Wills made by Infants, &c. or Persons not of sound Memory, are deemed not good in Law; but 'tis said an Infant at the Age of fourteen may make a Will of his Goods or Chattels.

By the Statute for Prevention of **Frauds**, Wills and Devises of Lands, &c. shall be in Writing, and signed by the Devisor, or some other by his express Directions, in the Presence of three credible Witnesses.

And no Will made in Writing shall be revoked, but by some other Will that is made in Writing, or by cancelling the same by the Testator himself, or by his Direction, &c. *29 Car. 2.*

Where a Man by Will devises all his Lands and Tenements, all the Lands he hath in Possession, and also in Reversion do pass: Though if a Person having Lands in Fee, and other Lands for Years, does make such Devise of all his Lands, &c. those in Fee-Simple only pass thereby. *2 Danvers Abr.*

'Tis held that Lands bought after the making of a Will, shall not pass by the Devise of all Lands and Estate, whereof the Testator should die possessed; for a Devise

Of Parcums and General Rules. 93

Devide of Land is not good, if the Devisor at that Time had nothing in them.

In such Case a Devise of personal Things will be construed good, tho' the Testator had them not at the Time of making his Will. *1 Salk.*

There are likewise some other Differences; a Term may be devised by Will to one for Life, with a Remainder to another for the Residue of the Term.

But a personal Chattel may not be given to one during Life, with Remainders to others; yet the Use thereof may, and the Thing itself afterwards to another. *Noy.*

By way of future Executory Devise, Land may be devised to an Infant in his Mother's Belly, and be good; 'tis otherwise by a Grant or Gift, where there ought to be one of Ability to take presently.

If the Lands are devised by Will to a Person, to hold to him for ever, the Devisee shall have a Fee-Simple; so where Land is given to one to dispose of at his Pleasure; or when a Man devises that such a one shall be his Heir, and have all his Inheritance.

But if a Devise of Lands be to one, without any more Words; or if it is of all a Man's Estate, it passeth only an Estate for Life, and not a Fee by Implication. *Hobart.*

The Law requires Certainty in the Description of Persons, and Things in a Will; and if Land be given to a Man who shall marry the Testator's Daughter, or to him and his Children, &c. it is certain enough.

A Condition in a Will, that a Woman shall not marry such a Person, or without Consent of another, is unlawful and void; except the Portion on the Marriage be limited over to some other Person, who in that Case may have the Legacy. *1 Mod.*

If a Man devises One thousand Pounds to his Daughter, at the Age of twenty-one Years, and she dies before, the Legacy is extinguished and gone.

But in Case such Legacy had been to be paid her at that Age, it is then *Debitum in praesenti, & solvendum in futuro*, by Construction of Law, and the Daughter's

94 Of Maxims and General Rules.

Administrator, &c. shall have it on her dying before.
2 *Ventris.*

Yet it is said that Words in Wills ought to be always construed according to the Intention of the Parties that make them, as near as can be collected; and the Intent in a Will, sometimes makes Estates pass contrary to the Rules of Law, with Respect to other Deeds.

No Will has Force till after the Death of the Testator; but then it gives and transfers Estates, and alters the Property of Lands and Goods, as effectually as any Deed or Conveyance executed in a Man's Life-time.

And thereby Descents may be prevented, Estates in Fee-Simple, Fee-Tail, for Life, or Years, may be made; and he that takes Lands by Devise is in Nature of a Purchaser. *Litt.*

A Person can make but one Will to take Effect; tho' he may make as many *Codicils* as he pleases.

The last Will made; or where in a Will there happens to be two Devises of the same Thing, the last Devise only stands in Force: But when the Testator is moved to make his Will by Fear or Threatning, in order that he may be at Quiet, &c. it may be set aside.
4 *Shepherd's Abr.*

And *Executor* of a *Will* is to assent to the Devise of Goods, &c. and he is to make an *Inventory* of all the Goods and Chattels of the Testator, with their Value, &c. in the Presence of two Legatees, or other sufficient Persons.

Then the Executor must prove the Will in the Spiritual Court, by his own Oath, or by Witnesses if required, and the Copy thereof in Parchment delivered to him under the Ordinary's Seal is called the *Probate*.

After this is done, the Executor is to pay all Debts, before Legacies, in the following Order, *viz.* The Charges of the Funeral being first satisfied, the King's Debt shall be preferred; then Debts on Judgments, and Statutes or Recognizances, those due on Mortgages, Bonds, and other Specialties, Rent on Leafes, Servants Wages, Debts on Shop-Books, &c.

And

Of Marriages and General Rules. 95

And if an Executor pays the Debts in any other Order, he is liable to the Payment of any Debt of a higher Degree, out of his own Estate, by the Common Law. *Plowd.*

The Executor is to pay the Legacies, after the Debts, and he may prefer a Legacy to himself: Also he may pay what Legacies he pleases first, or give to each Legatee a Part, in Proportion, on there not being enough for paying every one his whole Legacy.

And here the Executor is not bound to Order, as in the Case of Debts due from the Testator. *2 Ventr.*

An **Administrator**, is he who has the Goods of a Man dying *intestate*, without Will, committed to his Charge; and all such Goods as come to the Hands of the Administrator, shall be *Assets* to make him chargeable for Debts to Creditors, as Executors are to the Creditors and Legatees. *2 Inst.*

The Persons to whom Administration is grantable by the Ordinary, are as follow;

First to the Husband of the Wife's Goods and Chattels, and to the Wife of the Husband's Goods.

If there is no Husband or Wife, then to the Children, either Sons or Daughters.

In Case there be no Children alive, to the Father or Mother; after whom to a Brother or Sister of the whole Blood or half Blood.

And if there are none such, to the next of Kin, as Uncle, Aunt, or Cousin.

Lastly to a Creditor of the Deceased, or any other Person at the Ordinary's Discretion. *3 Salk.*

And after the Administrator has paid all Debts, he is to make a *Distribution* of the Surplusage, according to Law; as one Third to the Wife, and the Residue equally among the Children, and their Representatives.

Where there are no Children, a Moiety of the Personal Estate shall go to the Wife, and the rest equally to the next of the Kindred; and if there is no Wife but Children, the whole shall be divided amongst such Children; if there be neither Children or Wife, it shall

96 · Of Moot Points or Cases.

remain to the nearest of Kin in equal Degree. Stat. 22 & 23 Car. 2.

In Case Children die after their Father, without Wife or Child, the Mother, and every Brother and Sister, and the Representatives of them, shall have equal Share in their Personal Estates.

But no Representatives are allowed after Brothers and Sisters Children; and those advanced in the Intestate's Life-time, are excepted.

Tho' the Heir at Law is to have a Share in the Distribution. 1 Jac. 2.

IV. Of Moot Points or Cases.

THE Word *Moot* (as derived from the *Saxon*, *Motian*, to Plead) is a Term used in the *Inns of Court*, and signifies that Exercise or Arguing of Cases, which young *Barristers* and Students have been used to perform at certain Times, the better to qualify them for Practice, and Defence of Clients Causes.

And the Place where such *Moot Cases* were argued, was antiently called the *Moot-Hall*; at which Time the *Benchers* chose a *Bailiff of the Moots*: There was likewise an Exercise termed *Bolting*, which Word intended a private Arguing of Cases.

In these Exercises, two *Barristers* sat as *Judges*, and three Students brought each a Case, out of which the *Judges* chose one to be argued, which being done, the Students first argued it, and after them the *Barristers*.

Also there was an Afternoon's Exercise or *Moot*, for the Instruction of young *Barristers*, called the *Parvise*, bearing the same name originally with the *Parvise* in *Oxford*: Of this *Chaucer* says,

*A Serjeant at Law that ware and wist,
That often had been at the Parvise.*

By the antient Orders, a Person could not be called to the Bar, to plead Causes in our Courts, in less Time than eight Years, now reduced to seven; if they were not called *Ex gratia*.

The Exercises usually done by them, were twelve grand *Moots*, performed in the Inns of *Chancery*, in the Time of the Readings, and twenty-four petty *Moots* in the Term-times, before the Readers of the respective Inns.

A Barrister newly called was also obliged to attend the Exercise of the House the six next long Vacations, in Lent and Summer; and thereupon for those three Years, he has been stiled a *Vacation Barrister*.

But such young Counsellors and others are generally termed *Utter Barristers*, or *Plaunders ouster* the Bar, to distinguish them from the Counsellors or Benchers admitted to plead within the Bar, as the King, Queen, or Prince's Counsel are.

A great many of the Exercises, formerly required to be perform'd by Persons, before they were called to the Bar, seem to be of late dispensed with, which makes their Admission more easy.

All *Attornies* are now to serve a Clerkship of five Years, and be examined, sworn and admitted by the Judges in open court, and afterwards inrolled, before they shall be allowed to practise in the Courts at *Westminster*; and if they sue out any Writ, or act in those Courts, without being so admitted, &c. they are liable to a large Penalty.

As they are likewise, if they do not take the *Oaths* to the Government, and shall be disabled.

And the *Courts* of Law and Equity, for the Arguing, Trying and Determining all Cases, and which are always attended by the ablest Counsellors and Pleaders, are these following.

1. The *Chancery*, or the *High Court of Chancery*, so termed, because it is the highest Court of Judicature in this Kingdom, except that of the Parliament.

In Chancery the *Lord High Chancellor* presides, who is the chief Administrator of Justice next to the Sovereign;

98 Ofoot Points or Cases.

and is invested with the King's absolute Power, governing his Judgment purely by the Law of Nature and Conscience.

There is however in the Chancery an Ordinary Court of Law, whence issue original Writs, Commissions, *Scire facias's*, &c. for which this Court is always open, in Vacation as well as Term-time; whereas other Courts are confined to the Term: It likewise holds Plea of all personal Actions, by or against any Officer of the Court.

But a Cause cannot be tried by Jury in this Court; for if the Parties proceed to Issue, the Record is to be sent into *B. R.* and try'd there, after which it is remanded into Chancery.

Here the Extraordinary *Court of Equity*, is that wherein the Lord Chancellor has an unlimited Jurisdiction in Cases of Equity, which he exercises in moderating the Rigour of the Law, and giving Remedy by Way of *Bill and Answer*.

It is here Relief is given to infants, notwithstanding their Minicity, and for or against Feme Coverts; all Frauds and Deceits are relieved, for which there is no Redress at Common Law; Breaches of Trust and Confidences; and Accidents, as to relieve Obligors, Mortgagors, &c. against Penalties and Forfeitures.

And this court may oblige Executors to give Security and pay Interest for Money long in their Hands; order the Performance of a Will; Decree who shall have the Tuition of a Child; confirm Title-Lands, when Deeds are lost; make Conveyances, deficient through Mistake, good and perfect; oblige Men to come to Account with each other, &c. 4 *Inst.*

But in Suits where the Substance of them tends to the Overthrow of an Act of Parliament, or any fundamental Point of the Common Law; and whenever the Party can have his Remedy at Law, he ought not to be relieved in Chancery.

Also the Chancery will not retain a Suit generally for any Thing that is under 10*l.* Value, nor for Lands, &c. under

Of Moot Points or Cases. 99

under 40*s. per Annum*, except it be in a Case of Charity.

1 *Danvers Abri*

Where there is any Error in Proceedings, there may be a Bill of Review, or *Appeal* to the *House of Lords*.

2, The **King's Bench**, which is the Supreme Court of the Common Law, wherein the King of *England* sometimes sat in Person, and is still presumed in Law to sit there, but represented by his Judges. 4 *Inst.*

All Crimes that are against the publick Good, tho' they do not injure any particular Person, are under the Cognizance of this Court; for it is the *Custos morum* of all the Subjects of the Kingdom.

So that no private Subject can suffer any Kind of Violence or Injury, against his Person, Liberty or Possessions, but a proper Remedy is here afforded him, not only for the Satisfaction of Damages sustained, but likewise for the Punishment of the Offender. 2 *Hawkins*.

This Court is now divided into a *Crown-Side*, which determines criminal Matters of all Kinds, wherein the King is Plaintiff; as Treasons, Felonies, Murders, Robberies, Breaches of the Peace, and all other Causes that are prosecuted by Indictment, or Information, &c.

And a *Plea-Side* for trying Civil Causes, which holds Cognizance of all Actions commenced by Bill or Writ; as Actions of Debt, upon the Case, Trespass, Ejectment, &c. against any Person in the Custody of the *Marshal* of the Court, as every one sued here is supposed to be by Law. 4 *Inst.*

The Court of King's Bench has Power to regulate all the Courts of Law in the Kingdom, so that they do not exceed their Jurisdictions, nor alter their Forms, &c. It may reverse erroneous Judgments given in inferior Courts, and punish the Magistrates and Officers for Corruption.

Into this Court Indictments from the inferior Courts are frequently removed by *Certiorari*; and it may award Execution against Persons attainted in any other Courts, or even in Parliament, on Removal of the Record, and their Persons by a *Habeas Corpus*. *Hale's Hist.*

100 Of Moot Points or Cases.

Likewise it grants *Habeas Corpus's* to relieve Persons unjustly imprisoned ; and Writs of *Mandamus* for restoring Officers of Corporations, &c. as also Freemen disfranchised ; and from hence issues the Writ *Quo Warranto* against those as usurp Franchises and Liberties against the King, to seize the Liberties.

This Court may commit Persons to what Prison they think fit ; and Bails any Person whatsoever ; it grants Prohibitions to other Courts ; and may repeal the King's Letters Patent by *Scire facias*, &c.

3. The **Common Pleas**, termed otherwise *Common Bench*, is one of the King's Courts now held constantly in *Westminster-Hall* ; but in former Times was moveable, and followed the King.

It hath Jurisdiction in all Causes concerning Lands and Inheritances, of which Fines and Recoveries pass, and other Actions real by original Writ ; and in personal and mixt Actions, it hath a concurrent Jurisdiction with the King's Bench. 4 Inst.

According to *Fortescue*, this Court seems to have been the only Court for real Causes : But it has no Cognisance of Pleas of the Crown ; and *Common Pleas* are all Pleas as are not such.

And regularly it cannot hold Plea in any Actions, but by Writ out of Chancery returnable in this Court ; unless it be by Writ of Privilege or Bill for or against an Officer, or other privileged Person of the Court.

The Actions belonging to this Court come here, either by Original, Arrests and Outlawries ; or by Privilege, or Attachment ; or out of inferior Courts not of Record, by *Pone*, *Recordare*, *Accedas ad Curiam*, *Writ of false Judgment*, &c.

But no Persons are admitted to plead at the Bar, or to sign any special Pleadings in the Common Pleas, only Serjeants at Law.

4. The **Exchequer**, an ancient Court of Record, in which all Causes concerning the Rights and Revenues of the Crown are heard and determined ; tho' it is accounted the last of the four Courts at *Westminster*.

In

Of Most Points or Cases. 101

In the Exchequer there are divers Courts, yet the usual Division of it is into two Parts only, for Dispatch of Business, one of which is chiefly conversant in the *judicial* Hearing of Causes, and the other called the Receipt of the Exchequer, employed in the Receiving and Payment of Money. 4 *Inst.*

The judicial Part of the Exchequer is a Court both of Law and Equity; the Court of Law, being held in the *Office of Pleas*, according to the Course of the Common Law, before the Barons, and where all the Officers and Clerks, the King's Tenants and Farmers, Debtors, and Accountants, &c. are privileged to sue and be sued in like Actions as in *B. R.* or *C. B.*

And the Court of Equity is held in the Exchequer Chamber, before the Lord Treasurer, Chancellor or Under-Treasurer, and Barons; but generally before the Barons only, for the Lord Chief Baron is the Chief Judge.

In this Branch of Judicature the Proceedings are by *English* Bill and Answer, according to the Practice of the Court of *Chancery*, with this Difference, that the Plaintiff must set forth he is Debtor to the King, whether he be so or not.

It is in this court of Equity our Clergy usually exhibit Bills for the Recovery of their Tithes, &c. The King's Attorney General does also here bring Bills for any Matters concerning the Crown; and a Bill may be exhibited against the Attorney General by any Person grieved in any Cause prosecuted on Behalf of the King, to be relieved therein.

The leading Process here is a Writ of *Subpæna*, or *Quo minus*, which last goes into *Wales*, where no other Process out of Courts of Law ought to run, except a *Capias Utlagatum*.

For difficult Matters in Law, there is a Court of *Exchequer Chamber*, where all the Judges are assembled, and into which Causes are *adjourned*, when there are two Judges against two in Opinion and Judgment, that they cannot be determined in other Courts.

5. The

102 Of Moot Points or Cases.

5. The **Affises**, is the Court where the Writs and Processes of *Affise* are handled or taken, before an Assembly of Knights, and other Gentlemen, with the Judge or Justice, in a certain Place, and at a Time appointed.

In Respect to which, all the Counties of *England* are divided into six Circuits, and two Judges are commissioned to go each Circuit, who hold their Courts of *Affises* twice a Year in every County, except *Middlesex*, and try and determine Causes both Civil and Criminal.

For by Commission of *Oyer and Terminer* directed to them and many other Gentlemen of the County, and a Commission of *Gaol-Delivery*, they are authorised to try Treasons, Felonies, and every Prisoner in Gaol, committed for any Offence whatsoever.

And by their Commission of *Affise* they are empowered to take *Affises*, and do Right upon Writs of *Affise* brought before them by such Persons as are put out or dispossessed of their Lands and Possessions; but this is now usually done by *Ejectment*.

Also by Commission of *Nisi Prius*, Civil Causes grown to Issue are brought down in the Vacation, and tried at the *Affises* by a Jury of twelve Men of the County where the Cause of Action arises, before the Day of Appearance appointed for the Jury above. 4 *Inst.*

This is ordained for the Ease of the Parties, Jury and Witnesses; and on Return of the Verdict given by the Jury to the Court above, the Judges there give Judgment.

Where Causes are too difficult for the Judges of *Affise*, they shall be referred to the Justices of the Bench, to be ended. 9 *Ed. 3.*

6. The **County Court**; this is the Chief of the *inferior Courts*, and is a Court kept by the Sheriffs of every County, being divided into two Kinds; one retaining the general Name, held Monthly by the Sheriff or his Deputy.

The other called the *Turn*, which is held but twice a Year, *viz.* within a Month after *Easter* and *Michaelmas*; and after this is the King's *Leet* through all the County, to inquire of Treasons, Felonies, and Breaches of the Peace,

Of Moot Points or Cases. 103

Peace, &c. and punish Offences: It is a Court of Record, of which the Sheriff is Judge. *Crompton's Jur.*

It is observed that before the Courts of *Westminster* were erected, the County Courts were the chief Courts of the Kingdom; and in former Times had the Cognizance of great Matters, as appears by *Glanvil*, and other Writers, till they were reduced by *Magna Charta*.

But the County Court still retains the Determination of certain Trespasses and Debts under 40*s.* And by Virtue of a Writ of *Justicies*, the Sheriff may hold Plea of Debt and other personal Actions above that Sum; for this Writ is in the Nature of a Commission to him to do it. *Briton.*

By *Recordare*, &c. Causes are removed out of this Court into *B. R.*

7. The **Court-Leet**, a Court of Record ordained for Punishment of Offences against the Crown; and is said to be the most antient Court in the Kingdom.

This Court is incident to a Hundred, as a Court Baron is to a Manor; and it inquires of all Crimes and Offences under High Treason; but such as are punish'd with Loss of Life or Member, are only inquirable and presentable here, and to be certified over to the Justices of Assize. *Stat. 1 Ed. 3.*

Antiently this Court was called the *View of Frank-pledge*, because the King was there certified by the *View* of the Steward, how many Persons were within every Leet; likewise Persons were here bound with Sureties or *Pledges* for their Truth.

All Persons above the Age of twelve Years, having remain'd within the Leet for a Year and a Day, may be sworn to be faithful to the King, by our old Laws; and the People are to be kept in Peace, &c. *4 Inst.*

And every one from that Age to Sixty, is oblig'd to do Suit in this Court; except Peers, Clergymen, &c. and unless they are liable to appear at the Sheriff's Turn.

The Steward is the Judge of the Leet, and which ought to be held twice every Year, in like Manner as the Turn; but sometimes it is kept only once a Year, and

104 Of Moot Points or Cases.

and that by Custom is good. And here the Steward has Power to elect Officers, as Constables, Tithingmen, &c. as well as punish Offenders, *Kitchen.*

In this Court the usual Punishment, is by Fine and Amercement; the former assedged by the Steward, and the latter by the Jury, being twelve Freeholders or Reſiants, and for both of which the Lord may have an Action of Debt, or take a Distress.

8. The **Court-Baron**, which is a Court that every Lord of a Manor has within his own Precinct; and in antient Times, the Lords of Manors were styled *Barons.*

It is held by Prescription, and is of two Natures, *viz.* by the *Common Law*, which is the *Freeholders Court*, of which the Freeholders, being Suitors, are the Judges; and by *Custom*, which is called the *Customary Court*, and concerns the *Customary Tenants* and *Copyholders*, whereof the Lord or his Steward is Judge.

A Court-Baron may be of this double Nature, or one may be without the other. *4 Rep.*

In the *Freeholders Court*, that may be held every three Weeks, they have Jurisdiction in trying Actions of Debt, Trespass, &c. under 40*s.* but on Recovery of a Debt, they cannot make Execution, as other Courts may, but must distrain the Defendant's Goods, and keep them till Satisfaction is made.

'Tis in the *Customary Court-Baron*, that Estates are pass'd by Surrenders, Admittances, &c. But this Court is usually held only once or twice a Year along with the *Court-Leet*, unless it be on Purpose to grant an Estate, in which Case it is held as often as requisite. *2 Inst.*

Here the *Homage* Jury of *Copyholders* inquire that their Lords lose not their Services, Duties or Customs, but that the Tenants do their Suits of Court, pay their Rents and Heriots, &c.

They also present the Deaths of Tenants, Surrenders of Estates, and all Trespasses, &c. *4 Ed. 1.*

Of Actions and Suits, in Cases prosecuted in
the Courts at Westminster.

1. The **Action of Debt**, is a Suit given by Law where a Person owes another a certain Sum of Money, on Bond, or Contract for a Thing sold, which the Debtor refuses to pay at the Day agreed; then the Creditor shall have this Action against him to recover the same.

And where Money is due upon any Specialty, that is by Deed under Hand and Seal, this Action and no other lies.

Here if a Person acknowledges by Deed, that he has so much of another's Money in his Hands, an Action of Debt will lie for it; also where one owes Money to another, who hath his Note without Seal, Action of Debt lies on a *Mutuatus*.

But the Defendant may therein wage his Law, which he cannot do in an Action of the Case, brought upon Promise of Payment. 4 *Coke's Rep.*

Action of Debt is generally prosecuted on a Bill, Bond or Lease, &c. And in Debt on single Bill, a Defendant may plead Payment before the Action brought in Bar thereof; and on Bond, he may bring in the Principal, Interest and Costs, pending the Action, and thereupon be discharged. 4 & 5 *Ann.*

2. The **Actio upon the Case**, is a general Action that is given for Redress of Wrongs and Injuries, done without Force, and which by Law are not provided against.

It is said to have its Name, on Account of the whole Cause or Case being set forth in the Writ; and there is no other Action lies in the Case.

By Statute 'tis ordained, that this Action shall be had, rather than any Persons shall depart the King's Courts Remediless; wherein there may be the like Process, as in Actions of Debt or Trespass. 13 *Ed. I.*

106 Of Moot Points or Cases.

In general Action of the Case lies for *Nonfeasance* where a Person omits that which he ought to do, according to Promise, to the Damage of another ; and for *Malefeasance*, when one does something which ought not to be done ; and *Misfeasance*, where a Thing is undertaken, or the Law requires a Person to do it, and he doth it otherwise than he should. *Croke Car.*

The Actions are as various under these Heads, as the Torts and Injuries upon which they are founded.

For Deceits in Contracts, Bargains and Sales ; as where one sells another adulterated Wine, Corn full of Sand or Gravel, Wares by false Weights or Measures, &c. warrants a Horse to be found, or Clothes to be of such a Length, and they are not so, Action upon the Case will lie. *1 Danvers Abr.*

So for any private Nusance or Annoyance to a Person's House, Water, Way, Light or Air, by building, diverting, stopping, &c. whereby he is endamaged. *2 Roll.*

3. The *Action of Account*, is an Action that lies against a Person, who by Reason of his Office or Business undertaken, is to render an Account to another, but refuses to do it ; as a Bailiff or Receiver to a Lord and others.

If a Man makes one his Bailiff of a Manor, he shall have a Writ of Account against him as Bailiff, and in Case he appoints him his Receiver, to receive Rents or Debts, &c. he may have Account against him as such. *Fitzherbert.*

But a Bailiff cannot be generally charged as a Receiver, nor a Receiver as Bailiff.

Where a Person receives Money to another's Use, he shall have Action of Account against such Person as his Receiver, tho' he was not appointed Bailiff or receiver ; also if one pays Money to another, he may have this Action against him for the same received to his Use.

Tho' here the Party may discharge himself, by alledging that it was for some Debt, or to be paid by Order to some other Person, which he hath done, &c. *1 Lilly Abr.*

This

Of Moot Points or Cases. 107

This Action is now not so much used as formerly, there being no Damages given by it.

4. The Action of Covenant, is such as is brought, where a Man is bound by Covenant in a Deed, entered into by him and other Persons to do, or not to do some Act or Thing agreed between them, when he hath broke the same.

In Case it be agreed, that one Person shall pay 100*l.* to another for certain Lands, this is a mutual real Covenant; and Action of Covenant lies, if the other Party refuseth to convey, &c. 2 Mod.

A Person makes a Lease for Years, and then turns the Lessee out of the Lands, he may have Action of Covenant against the Lessor, tho' there be no express Covenant in the Deed.

Yet in the Case a Stranger enters before such Lessee, he shall not have an Action upon this *Offer*, because he was never a Lessee in Privity to have Covenant. *Yelverton.*

On a Bond Action of Covenant lies, for it proves an Agreement; tho' when only a Hand is to a Writing, and no Seal thereto, Covenant does not lie; but Action of the Case upon Breach of the Agreement. 2 Danvers.

5. The Action of Detinue, is an Action that lies against one who has got Goods or other Things delivered to him to keep, and he afterwards refuseth to deliver them.

For any Thing certain and valuable, wherein one may have Property, Detinue will lie; in which Action the Thing detained is generally recovered, and not Damages; tho' if a Man cannot recover the Thing itself, he shall recover the Damages for it, and also for the Detainer. 1 Inst.

If on the Delivery of Goods, the Person to whom they are delivered dies, Action of Detinue may be brought against his Executors, or any one to whose Hands they come: And where the Goods are delivered over to another, this Action shall be immediately had against the second Person.

And

108 Of Moot Points or Cases.

And notwithstanding the Party deliver the Things to a Person that has Right to the same, yet 'tis said he is chargeable. *2 Danvers.*

A Man may likewise have a general Detinue against one that finds his Goods; but if before the Owner brings his Action, the Finder sells them, or they are recovered in Execution, &c. he cannot bring Detinue. *Fitzherb. Nat. Brv.*

There is an Action of *Detinue* that lies for *Deeds and Charters*, which make the Title to Lands; and here the Defendant shall not wage Law, nor in *Trover* and *Conversion*, tho' in a common Action of Detinue he may do it. *2 Inst.*

6. The *Action of Trover and Conversion*, which comes from the *French Trouver, invenire*, is a special Action of the Case that lies against a Person, who having found another's Goods, refuses to deliver them upon Demand.

Or it is where a Man has in his Possession the Goods of another by Delivery to him, or otherwise, and the Person so possessed, sells or makes Use of them without the Owner's Consent.

And this Action lies for the Recovery of Damages to the Value of the Goods, &c. *2 Lilly.*

It is called *Trover and Conversion*, because the Plaintiff in the Action surmises, that he lost such and such Goods, and that the Defendant found them, and at such a Place converted them to his own Use.

But here the *Losing* is only a mere Suggestion, and in no Respect material.

If a Person find Goods, and doth refuse to deliver them to the Owner on Demand, this is a *Conversion* in Law; yet he may answer, that he does not know whether the Person demanding is the right Owner or not, and then it is held to be no *Conversion*. *1 Danvers Abr.*

Altho' a Defendant tenders the Goods or Things, after a Demand and Refusal made, or even if they come into the Plaintiff's Possession, neither of these will purge the

Of Root Points or Cases. 109

the Wrong, or make Satisfaction to the Plaintiff for detaining of the Goods.

For they shall only go in Mitigation of the Damages, but not to the Right of the Action of Trover, which the Party is still intitled to. *Mod. Cas.*

In Case one puts out his Cattle to Pasture, and then sells them, the Buyer may have Action of Trover against the Farmer, &c. if he refuses to let them go till paid for.

Here the Farmer's Remedy must be had by Action for what is due to him for depasturing the Cattle.

And he may not detain them for the Debt, as in the Case of an Inn-keeper, or Taylor, &c. for Things in their Custody. *Croke Car.*

7. The **Action of Slander**, is an Action of the Case brought for Words, where a Person is injured in his Reputation.

And for any Words spoke of another, which affect his Life or Liberty, Office, Trade, or tend to his Loss of Preferment in Marriage, or Service, or to his Disinheritance, or which occasion any particular Damage, this Action lies. *Dyer.*

So it is when Words are in general maliciously spoken of a Person, for which, if true, such Person might be punished.

But if the Words are spoke in prosecuting a Cause, in an ordinary Course of Justice, as where a Lawyer in Pleading, shall utter any Words according to his Instructions, those Words will not maintain an Action. *Croke Jac.*

Also in other Cases, if the Defendant can make Proof of the Words, he may plead Special Justification, that they are true.

If a Person be prosecuted by Way of Information for a *Libel* against another, it is not material whether the Matter be true or false, he shall nevertheless be punished. *Hobart.*

See *ante* the Maxim, *Lubricum Linguae non facile in pœnam est, &c.*

110 Of Most Points or Cases.

8. The **Action of Assault and Battery**, is an Action that lies for Trespass against a Man's Person, where any Injury is done to another in a violent Manner: And such Offence is also indictable, tho' it is usual not to prosecute an Indictment, but to bring this Action only for Damages. *Terms de Ley.*

But if a Person be assaulted or beaten, and he hath no Witnesses to prove the Fact, the Party instead of his Action for the Battery, may bring an Information in the Crown-Office against the Aggressor, and there he shall be fined to the King.

'Tis held that the least Touching of another Person in Anger, is a Battery, which may be committed either by Pushing, Jolting, or Fillipping upon the Nose, &c. and Spitting in a Man's Face, is Battery; if not done by Accident. *Dalton.*

The laying Hands gently on one is not Battery to found an Action; the Law will not presume any Damage in such Case, and the Defendant may justify *molliter manus impedit.*

If a Person is beaten by another, he may likewise return it, and Plead that the Plaintiff's Battery was occasioned by his own first Assault, whereupon the Defendant shall go quit, and the Plaintiff be amerced. *2 Inst.*

For the Battery of a Person's Wife, Child or Servant, the Husband, Father and Master shall have this Action.

9. The **Action of Trespass**, is that Action as generally lies for any Wrong or Damage, which is done with Force and Arms by one private Man to another; and it is sometimes against the Person, and sometimes against his Lands and Goods.

An Action of Trespass lieth where any one makes an Entry on another's Lands, and there does Damage; also *Trespass Vi & Armis* may be brought by a Person who has the Possession of Goods, or of a House or Land, if he be disturb'd in his Possession. *2 Rolls. Abr.*

To

Of Moot Points or Cases. 111

To enter into an House against the Will of the Owner, is Trespass for which Action lies ; but a Man may lawfully come into the House of another, to demand Money, &c. yet it has been held, that if a Person has a Horse in another Man's Ground, and he enters therein to take it away without Leave, Action of Trespass lies against him. *4 S. & P.*

And this Action will lie for breaking a Person's Close or Ground, or driving a Cart and Horses over his Land, where there is no Way for it ; for eating Corn of another with Cattle, cutting of Trees on the Land, or damaging the Grafs.

So where one breaks the Doors, Windows, &c. of another's House, or Fences of Land ; or chases Cattle by which Means they die, or are damnified ; or if he fish in another's Pond ; or pluck up Garden Herbs and Roots ; or tear a Bond or other Writing, &c. *Broke.*

Tho' if the Jury do not give 40*s.* Damage in Trespass, the Plaintiff shall have no more Costs than Damages ; unless the Title of the Land come in Question, or something of the Plaintiff's be carried away, &c. Stat. 23 Car. 2.

10. The **Action of Waste**, is an Action that is brought where any Waste or Destruction is made either in Houses, Lands, or Woods, &c. by Tenant for Life or Years, to the Damage of the Heir or him in Reversion or Remainder. *1 Inst.*

As if any such Tenant pulls down his House, or willingly suffers it to fall, or to be uncovered, or in Decay, and do not repair the same in due Time.

If he cuts down Timber-Trees on the Land with an Intent to sell them, or for any Purpose but for Repairs ; or in Case he cut young Trees for Reparations, when there is other Timber ; or Green Wood, if there be Dry ; or more Fire-bote than is necessary.

Or where he ploughs up Ground that Time out of Mind has not been ploughed, or if he plough up Wood-lands, convert Meadow into an Orchard or Arable Land, or Arable Land into Meadow, or Pasture into Arable.

Or

§ 12. Of Root Points or Cases.

Or in Case he digs Mines of Metal or Quarries of Stone, &c. without Power by express Covenant, or destroys Deer in a Park, Doves in a Dove-house, or Fish in a Pond, &c.

In all these Cases the Heir of the Land, or the Person in Reversion may have a Writ or Action of Waste, and shall thereon recover the Place where such Waste is committed, with treble Damages. 4 Rep.

And before any Waste is done, a Prohibition may be had, directed to the Sheriff, that he do not permit the same; or he in the Remainder, &c. can have an *junction* out of the Chancery to stay the Waste. *Fitzherbert.*

11. The Action of *Ejectment*, is now the common Action for Trial of Titles, and recovering of Lands, &c. illegally held and kept from the right Owner.

For it is become an Action in the Place of many real Actions, such as Writs of Right, *Formedons*, &c. which are very difficult as well as tedious and expensive.

There is no Arrest required in this Action, as now generally prosecuted; but if there be not a Tenant in Possession, as where a House or Land is empty, and no Person can be found to whom the Declaration may be delivered;

In that Case the Plaintiff must proceed by Sealing a Lease upon the Land, &c. And an original Writ is to be sued out against the Person who ejected the Lessee, and then Ouster and Ejectment, &c. 1 *Lilly.*

The usual Course of proceeding in Ejectment is to draw a Declaration only, and feign therein a Lease for three, five, or seven Years, to him that would try the Title, and also feign a casual Ejector or Defendant, and then deliver the Declaration to the Ejector, who serves a Copy of it on the Tenant in Possession;

And at the same Time gives Notice at the Bottom, for him to appear and defend his Title, or that he the feigned Defendant will suffer Judgment by Default, whereby the true Tenant will be turned out of Possession of the Lands.

To

To this Declaration, the Tenant is to appear the Beginning of the next Term by his Attorney, and consent to a Rule to be made Defendant instead of the casual Ejector, and take upon him the Defence, wherein he must confess *Lease, Entry and ouster*, and at the Trial stand upon the Title only.

But if the Tenant in Possession does not appear, and enter into the said Rule in Time, after the Declaration served, then on Affidavit being made of the Service of the Declaration, with the Notice to appear as aforesaid, the Court will order Judgment to be entered against the casual Ejector by Default, and thereupon the Tenant by Writ is turn'd out of his Possession.

In Case such Tenant appears to the Action, having by his Attorney filed common Bail, and enter'd into the Rule aforementioned, he is made Defendant in the Declaration, and put into the Place of the Ejector.

And then the Defendant's Attorney must plead Not Guilty, and the Attorney for the Plaintiff draws up the Issue in the Cause, a Copy whereof and of the Declaration is to be deliver'd to the Attorney for the Defendant, whereupon Notice is given of Trial.

In order to which, the Writ of *Venire, &c.* is to be made out and returned, and the Record made up by the Plaintiff's Attorney, beginning with the Declaration; then the *Breviate* of the Cause is to be prepared, in which, after a short Recital of the Declaration and Plea, the Plaintiff's Title is to be set forth from the Person last seised in Fee of the Premises, under whom the Lessor claims down to the Client, the Plaintiff proving the Deeds, &c.

And after Trial the Proceedings are as in other Cases.
1 Lilly's Abr.

By a late Statute, those Tenants to whom Declarations in Ejectment are delivered for any Lands, &c. are to give their Landlords Notice thereof, on Pain of forfeiting three Years Rent.

And the Court where such Ejectment shall be brought, may suffer the Landlord to make himself Defendant, by joining

114 Of Most Points or Cases.

joining with the Tenant, if he appears; but if he does not, Judgment shall be signed.

• Tho' in Case the Landlord desires to appear by himself, and consents to enter into the like Rule as the Tenant, if he had appear'd, ought to have done; the Court shall permit him so to do, and order a Stay of Execution, &c. 11 Geo. 2. See *ante*, *Lease*, and *Mortgage*.

The Plaintiff in Ejectment recovers only according to the Right which he has at the Time of bringing his Action; and on his Recovery by Verdict, he may have an Action of Trespass to recover the mesne Profits of the Land, from the Time of the Defendant's Entry laid in the Declaration.

And if Judgment should be against the Plaintiff, he can bring another Action of Trespass and Ejectment for the Lands, it being only to recover Possession, &c. *Trin. 23 Car.*

Also wherever a Defendant is barred in any real Action concerning Lands, either by Judgment upon Verdict, Demurrer, or Confession, &c. he may bring an Action of a higher Nature, and try the same Right again, as it concerns the Inheritance.

But in personal Actions, as Debt, &c. a Bar is perpetual; for the Plaintiff cannot have his Action of a higher Nature, but his only Remedy is by Error or Attaint; and sometimes in the Chancery.

The Times wherein real and personal Actions are to be brought, by the Statute of Limitations, see *ante* the Maxim, *Vigilantibus non Dormientibus Leges subveniunt*.

General Proceedings in Trials of Cases in the Superior Courts.

1. The **Writ** is to be made out and sent to the Sheriff, which runs in the King's Name, and contains a short State of the Plaintiff's Demand, whether it be of Lands, Money, or Goods, or Satisfaction for Injuries done, or for Breaches of Contract, &c. on which the Defendant

Defendant is summoned to appear and answer such Demand.

When the Writ comes to the Sheriff's Hands, he grants his Warrant thereon to his Bailiffs to execute it; and if it be an Action of *Debt*, or on the *Case* for Money, sworn to be above 10*l.* they arrest the Defendant, and take a *Bail-Bond* with sufficient Sureties to the Sheriff for the Defendant's Appearance, and afterwards Bail is given to the Action.

But if the Debt is under 10*l.* in that Case the Defendant shall not be arrested, but be served personally with a Copy of the *Process*, and Notice at the Bottom to appear on the Return of the Writ; which if he does not in eight Days, the Plaintiff by a late Statute may enter a common Appearance for him, and thereupon proceed.

2. The *Appearance*, signifies the Defendant's filing Bail on any Process issued out of the Courts at *Westminster*; and in common Bail, the Sureties *John Doe* and *Richard Roe* are taken of Course. Here if a common Appearance only, and not special Bail is required, the Party may appear in Court in his proper Person.

And if an Attorney undertakes to appear for his Client, the Court will compel him thereto, and to put in common Bail; after an Appearance or common Bail entered and filed, the Plaintiff declares against the Defendant.

3. The *Declaration*, is a formal Shewing in Writing, the Ground of Complaint of the Plaintiff in the Action against the Defendant, as the Non-payment of the Debt upon Request, &c. And the Plaintiff has two Terms after the Return of the Writ, to exhibit his Declaration, that Term being accounted one wherein the Writ was returnable.

And if no Declaration comes in before the Rising of the Court, the last Day of the second Term, the Plaintiff may be nonsuited, and the Defendant have Costs.

The Plaintiff's Attorney is to file his Warrant the Term he declares; and to deliver a Copy of the Declaration to the Defendant or his Attorney, who pays 4*d.*

116 Of Moot Points or Cases.

per Sheet for the same; and the Plaintiff's Attorney gives a Rule for the Defendant to plead by a certain Day.

4. The Plea, is the Defendant's Answer to the Plaintiff's Declaration; tho' in a more extensive Sense, *Pleading* contains whatever either Party alledges for himself in the Cause depending.

A Plea is either *general*, and enters into the Merits of the Cause, being a general Answer to the Declaration, as in Debt on Contract, that he the Defendant owes nothing; or it is *special*, and sets forth the Matter at large.

The special Plea is drawn up in Form and signed by Counsel, or it will not be received; but a general Plea need not to be signed by Counsel: And every Plea must be pleaded either in *Bar* to the Action brought, or in *Abatement* of the Writ Bill on which the Action is framed.

If a Plea fails in answering all the Plaintiff's Charge or Matter alledged, the Plaintiff shall have Judgment as for Want of a Plea; also where a Defendant pleads that he did not receive a certain Sum, if he does not say or any Part thereof, it is ill.

But when a Defendant pleads a bad Plea, if Issue be joined thereon, and a Verdict is given for the Defendant; the Plaintiff shall not take Advantage of the Insufficiency of the Plea, to which he ought to have demurred.

Where Process is returnable the first or second Returns of Terms, the Defendant is to plead in four Days, if he lives within twenty Miles of *London*, and if farther off in eight Days, after Delivery of the Declaration, with Notice to Plead, &c. and that without any *Imparlane*, or craving a further Day to advise; or making Default, the Plaintiff may sign his Judgment, by late Orders of Court.

The Defendant having pleaded to the Plaintiff's Action and Declaration; to such Plea, the Plaintiff may make a *Replication* or Answer; and to that there may be a *Rejoinder* by the Defendant, 'till the Parties are at Issue in the Suit.

5. The

Of Moot Points or Cases. 117

5. The **Issue**, signifies the Point of Matter which issues forth of the Allegations and Pleas of the Plaintiff and Defendant, in the Cause to be tried by a Jury of twelve Men.

And in every Issue there ought to be an Affirmative on the one Part, as that the Defendant is indebted to the Plaintiff in a certain Sum, &c. And a Denial on the other Part, that the Defendant does not owe the Debt or Money charged, &c.

For there must be ever a Negative and Affirmative of it, to make a right Issue; 'tis also observ'd, that without Issue joined there can be no good Trial, nor ought Judgment to pass.

When the Parties have thus proceeded to Issue, the Attorney for the Plaintiff makes a Copy of the Issue and delivers it to the Defendant's Attorney, with Notice of Trial; in order whereto, a Writ of *Venire facias* must be issued, and a *Distringas* to the Sheriff to return the Jury, and the Record is made up for Trial.

6. The **Trial**, is the Examination of a Cause before a Judge, and Trying of the Question, or Point in Issue between the Parties, whereupon Judgment is given.

To proceed in the Trial at the *Affises*, when a Cause comes on, the *Distringas* of the Jury is to be first returned by the Sheriff, and then the Record must be delivered to the Judge's Marshal; upon which the Counsel being instructed with their Briefs, &c. and all Parties ready, the Marshal gives the Record to the Judge, and the Cryer calls over the Names of the Jury.

The Persons to serve on a *Jury*, are to be Freemen, and indifferent, no Ways interested in the Cause, and not outlawed or infamous; neither ought they to be Aliens, or Men attainted of any Crime, or be Infants, Persons of seventy Years of Age, &c. They are likewise to have 10*l. per Annum* Freehold, and be returned from the County where the Fact arises.

And to the Jurors there may be a Challenge, or Exception taken before they are sworn, on Account of Favour or Affinity, or their having been convicted of

118 Of Most Points or Cases.

Felony, &c. or where any one of them has given a Verdict before in the same Cause, Matter or Title.

After the Jury are sworn, being first elected by Ballot, according to the Statute, they are bid to stand together, and hear their Charge; on which, the Counsel of both Sides open the Case, first on the Side of the Plaintiff, as the Proof lies on him, and looking over their Breviates, they argue the Matter in Controversy, producing Witnesses to prove what they alledge.

Which *Witnesses* are also to be Persons of Credit, disinterested, and not such as have been convicted either of Felony, or Perjury, or adjudg'd to the Pillory or other infamous Punishment, or Persons *non Sane Memoriae*.

And when the *Witnesses* are heard and examined, the Judge sums up the Evidence, and gives it in Charge to the Jury to do impartially therein.

If the Jury do not immediately agree on their Verdict, but withdraw to consider of it, then a Bailiff is to keep them without Meat, Drink, Fire or Candle, and without being admitted to the Speech of any, in which Manner they are all kept together till they agree and bring in their Verdict.

7. The *Verdict*, is the Answer that is given to the Court by the Jury, concerning the Matter of Fact in the Suit committed to their Trial; in which every one of the Jurors must agree, otherwise it can be no Verdict.

And a Verdict must in all Things answer the Issue, or it will not be good; if the Plaintiff fails to prove his Issue, there the Verdict ought to be found for the Defendant; and no Verdict can make that good, which is not so by Law, of which the Court is to be Judge.

In Case any of the Jurors eat or drink, at the Charge of the Party for whom they give their Verdict; or if either of the Parties, or their Attornies, do say any Thing to the Jury, which relates to the Cause, before they are agreed on the Verdict, as that it is a clear Cause, or I hope you find for such a Person, &c. Or if a Witness be sent for by the Jury after he is gone from the

Of Moot Points or Cases. 119

the Bar, and he repeats his Evidence again ; in any of these Cases, the Verdict shall be void, and set aside.

Also the Jurors may be fined, for being tamper'd with ; and an Attaint will lie against a Jury for giving contrary to Evidence, where any Corruption appears, on which, being convicted, they are liable to a very severe Punishment ; likewise if they take any Thing to give a Verdict, they shall forfeit ten Times as much as taken, and be imprisoned a Year.

The Jury being return'd to the Bar, and ready to give in their Verdict, the Plaintiff is then called, and if he do not appear, a Nonsuit shall be recorded, &c. but if he appears, the Clerk of Assise asks the Jury who they find for, and what Costs and Damages, and so enters it on the Panel, and repeats it to the Jury, which finishes the Trial.

And after the Trial is over, the Associate delivers to the Plaintiff's Attorney the Record with the *Distringas*, and the Names of the Jury annexed, on the Back of which he endorses the Substance of the Verdict, and then upon the Back of the Record is ingrossed the *Postea*.

That afterwards the Plaintiff and Defendant came before such a Judge, and the Jury was elected and sworn, and found such Verdict and Costs, &c.

This is to be carried to the Clerk of the *Postea's*, to be marked, and after delivered to the Clerk of the Rules, and he makes a four Days Rule for Judgment, (that Time being allowed the Defendant to move in *Arrest of Judgment*) and when such Rule is out, if it be not arrested, the Judgment is fit to be entered.

8. The **Judgment**, signifies the Determination or Sentence of the Judges upon the Suit or Action tried ; which if given contrary to the Verdict, will not be a good Judgment.

In Trials at the Assises, Note the Record is generally kept by Associate till next Term, when he is to be called upon for the same, and then it is marked, and a Rule taken out as aforesaid ; and thereupon Judgment is signed, and entered on a Roll, on which a *Writ of Execution*

120 Of Moot Points or Cases.

cution is awarded, against either the Body, Goods, or Lands of the Defendant.

9. **New Trials**, are granted in several Cases; as where there was not sufficient Notice given to the Defendant of the former Trial; or if excessive Damages are assessed by the Jury; or a Verdict is given against Evidence; or in Case any Fraud appear.

Tho' a new Trial shall not be allowed for Want of Evidence at a former Trial, which the Party might then have produced.

10. **Trial at Bar**, is ordained when Causes require great Examination, and the Title in Question is difficult or intricate, for the better Satisfaction of the Parties concerned.

And in order to such Trials, the Juries and Witnesses must come to the Courts at *Westminster*.

11. **Bill of Exceptions**, is where the Plaintiff or Defendant in a Suit alledges any Exception to the Judge's Opinion, which may be put down in Writing, and signed by Counsel, &c. and here the Court above proceeds to Judgment according to the Exceptions.

12. **Writ of Error**, is that Writ which is brought by a Plaintiff or Defendant in any Action, who is grieved by the Proceedings and Judgment given therein; and which any Person damaged by Error in a Record, or who can be supposed to be injured thereby, may bring; on which the Judgment may be reversed.

These Writs of Error are returnable from one Court to another, until they come to the *Exchequer Chamber*, and *lastly*, to the *Lords in Parliament*.

And thus we may observe, thro' the abundant Care and Punctuality required by Law in the Trial of Causes, there is as much as Art and Conscience can contrive against Corruption, and in Favour of Right.

V. Of Words of Art and Terms.

TERMS of the Law, are such artificial or technical Words and Terms of Art, as are particularly used in and adapted to the Profession of the Law: And the most considerable of these relate either to Writs and Process, or the Practice of Pleading, and contain as follows:

1. **Accord**, is a Word derived from the French, that signifies an Agreement between two or more, where any one is injured by a Trespass committed, to make Recompence and Satisfaction to the Party grieved; and which after the Accord is performed and executed, may be pleaded in Bar to any Action brought for the same Trespass. *Terms de Ley.*

2. **Alias**, is a second or another Writ, which issues from the Courts at Westminster, after a first Writ has been sued out without any Effect.

3. **Affumpſit**, from the Latin, is taken in the Law for a voluntary Promise, whereby a Person assumes or takes upon him to perform or pay a Thing: And when any one becomes legally indebted to another for Goods sold, the Law implies a Promise that he will pay this Debt; and if he do not, *Indebitatus Affumpſit* or Action of the Case lies against him.

4. **Audita Querela**, is a Writ that lies where a Person has any Thing to plead, but hath not a Day in Court for pleading it; as when one is bound in a Statute or Recognizance, or where Judgment is given in Debt, and the Defendant's Body in Execution, then if he have a Release, or other sufficient Cause to be discharged from it, this Writ may be granted him against the Person that has recovered.

For to Writs of Execution the Defendant cannot plead; so that if there be any Matter since the Judgment, to discharge him of the Execution, he is to have *Audita Querela*.

5. **Averment**, is used in order to ascertain to the Court what is doubtfully alledged ; and relates either to Pleadings, or to Deeds, which may sometimes be made good by Averment, where a Person is not certainly named ; and if no Use is expressed, or but uncertainly in any Deed, Averment shall be admitted as an Addition or Explication.

6. **Capias**, is a Writ of two Sorts ; one before Judgment called *Capias ad Respondendum*, where an Original is sued out, &c. to take the Defendant, and make him answer the Plaintiff ; and the other a Writ of Execution, called *Capias ad Satisfaciendum*, which issues, on a Judgment obtained, and is directed to the Sheriff commanding him that he take the Defendant's Body, and imprison him till Satisfaction be made for the Debt, &c. recovered against him.

If the Body of the Defendant is taken in Execution upon the Writ, and the Writ is returned and filed, no other Execution can go against his Lands, or Goods : And by the Statute 2 Geo. 2. Persons charged in Execution for any Debt, not exceeding 100*l.* on Petition to the Court whence the Process issued, with an Account of all their Estates upon Oath, may be discharged out of Prison, on assigning their Effects to the Plaintiff, unless the Plaintiff chuse to allow the Prisoner 4*d.* a Day.

7. **Clausum fregit**, signifies as much as an Action of Trespays, and in the *Common Pleas* the usual Course is to declare in Actions, especially upon an *Affumpſit*, or the like, on a *Quare Clausum fregit*, as they do on a *Latitat* in the *King's Bench*.

8. **Colour**, in the Law signifies some probable Plea of a Defendant, which in Fact is false ; but it has this End in it, *wiz.* to draw the Trial of the Cause from the Jury to the Judges : It is used in Assises or Actions of Trespays ; as in an Assise to give Colour of Freehold, &c. And it ought to be Matter in Law, or doubtful to the Jurors.

9. **Demurrer**, is a Term from the *French* and *Latin*, signifying a Delay or Stop put to any Action, upon some Point

Of Words of Art and Terms. 123

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Point of Difficulty, which must be determined by the Court, before any further Proceedings can be had in the Suit: And a Demurrer is said to be an Issue joined on Matter of Law, which the Judges only are to determine; or an Abiding in and Referring to the Judgment of the Court, whether the Declaration or Plea of the adverse Party, is sufficient in Law to be maintained.

And where a Defendant may demur, he must do it; for if he pleads in such a Case, he shall not afterward take any Advantage in Arrest of Judgment, or by Writ of Error, &c.

10. **Elegit**, is a Writ of Execution that lies for one who has recovered a Debt or Damages, against a Defendant that is not able to satisfy the same in his Goods; and this Writ is directed to the Sheriff to make Delivery of a Moiety of the Party's Lands, and all his Goods, Beasts of the Plough excepted, which is done by Inquest of a Jury; and the Creditor by Virtue thereof shall hold the said Moiety of the said Lands so delivered to him, until his whole Debt and Damages are paid and satisfied.

11. **False Imprisonment**, signifies a violent Trespass committed against a Person, by arresting and imprisoning him without just Cause, contrary to Law; or where one is detained in Prison without legal Process, or kept longer in Hold than he ought, or if he be any Way unlawfully detain'd: 'Tis also used for a Writ or Action brought for such Trespasses, in which generally very considerable Damages are recovered; for the Law favours the Freedom of a Person from Imprisonment.

12. **Fieri facias**, is a judicial Writ that lies where a Person has recovered Judgment for Debt or Damages in the King's Courts against any one, by which the Sheriff is commanded to levy the Debt and Damages on the Defendant's Goods. Upon a *Fieri facias* the Sheriff is to use his best Endeavours to levy the Money on the Goods and Chattels of the Defendant; he may sell a Term for Years, or Corn growing, &c. and has Power to take any Thing of the Defendant's, except it be wearing Clothes.

124 Of Words of Art and Terms.

But the Goods of a Stranger, in the Possession of the Defendant, shall not be subject to the Execution; nor may a Sheriff break open the Door of an House to execute this Writ on the Goods of the Owner, &c.

13. **Habere facias Possessionem**, is a Writ which lies where one has recovered a Term for Years in an Action, in order to put him into *Possession*: There is likewise a Writ of this Kind, commanding the Sheriff to give a Person *Seisin* of Land recovered on an *Ejectment*. On these Writs, the Sheriff may justify breaking open the House, where Entrance is denied, to deliver Possession to the Party recovering at Law.

14. **Innuendo**, is a Word that has been frequently used in Declarations of Slander and Law Pleadings, when they were in *Latin*; for ascertaining a Person or Thing that was before named. Though an *Innuendo* cannot make that certain, which was uncertain before; and the Law will not allow Words to be enlarged by *Innuendo*, so as to support an Action on the Case for uttering them.

15. **Journeys Accounts**, is a Term in our Law, where a Writ abates by the Death of the Plaintiff or Defendant in a Cause, or for Want of Form, &c. in which Case the Plaintiff becomes intitled to have a new Writ, by *Journeys Accounts*, that is to say, within as little Time as he possibly can after the Abatement of the first Writ; so that the second Writ shall be a Continuance of the Cause, as much as if the first Writ had never abated.

16. **Latitat**, is a Writ that issues out of the Court of *King's Bench*, and has its Name upon a Supposition that the Defendant does *lurk* and *lie hid*, and cannot be found in the County of *Middlesex*, to be taken by *Bill*, but is fled into some other County, and to the Sheriff whereof this Writ is directed, commanding him to apprehend the Defendant there.

17. **Negative**, is what cannot be testified or proved by Witnesses in our Law, only an Affirmative; but if a Man be accused to have been at *York*, and there to have done such a Fact, he may prove the Negative by collateral

Of Words of Art and Terms. 125

teral Testimony, that he was at that very same Time, at another Place, in such Company.

18. **Negative Pregnant**, signifies a *Negative* that implies an *Affirmative*; as where a Defendant pleads a Plea in Bar, of the Plaintiff's Action, which is not so special an Answer thereto, but that it includes also an *Affirmative*: For Example, if one in Reversion brings a Writ of Entry, upon an Alienation made by Tenant for Life, supposing he has aliened in Fee, which causes a Forfeiture of his Estate, and the Tenant pleads that he hath not aliened in Fee;

This is a *Negative* wherein an *Affirmative* is included, and to which the Plaintiff may have a Demur-
rer; for tho' it be true that he has not aliened the Land in Fee, yet it may be he has made an Estate in Tail, which is likewise a Forfeiture.

19. **Nil debet**, That he owes nothing, is the usual Plea in an Action of Debt.

20. **Nihil dicit**, writ short, *Nil dicit*, signifies a Failure in the Defendant to put in his Answer to the Plaintiff's Declaration, &c. by the Day assigned, on which Judgment of Course is had against him.

21. **Non assumpsit**, is the general Plea in a personal Action, whereby one denies any Promise made.

22. **Non est culpabilis**, or **Non cul.** is an usual Plea to an Indictment or Action of Trespass.

23. **Non est factum**, is a Plea where any Action is brought upon a Bond, or other Deed, and the Defendant denies it to be his Deed; which Plea may be pleaded where the Deed is void, or rased in a material Part.

24. **Non pros.** is where a Plaintiff in an Action does not declare in a reasonable Time; and a **Molle prosequi** may be entered by the Plaintiff, if having commenced an Action, he will not proceed therein.

25. **Monsuit**, signifies the Dropping of a Suit or Action, and is most commonly upon the Discovery of some Error in the Plaintiff's Proceedings, when the Cause is so far proceeded in, that the Jury is ready at the Bar to deliver

126 Of Words of Art and Terms.

deliver in their Verdict; on his being called, and not appearing; or not prosecuting his Action with Effect, &c. whereupon Costs are allowed to the Defendant.

26. **Outlawry**, is where a Person is outlawed, that is, deprived of the Benefit of the Law, and therefore held to be out of the King's Protection; as where an original Writ, and the Writs of *Capias, Alias, and Pluries* have been issued against him, and are returned by the Sheriff *Non est inventus*, and after an Exigent for the Sheriff to demand him at five successive County Courts, and *Proclamation* made for him to appear, &c. if he omits so doing, he then becomes outlawed.

A Person outlawed forfeits his Goods and Chattels, &c. and cannot sue in any Court, only to reverse the Outlawry, which he may do for Error, or when the Statutes relating to the same are not exactly pursued.

27. **Dyer**, is where an Action being brought on a Deed or Bond, the Defendant appears and prays that he may *bear* the Deed on which the Action is brought, and also have a Copy thereof, that he may consider what to Plead thereto; and the Defendant is not obliged to Plead without it.

28. **Protestando**, in the Law is a certain Form of Pleading, where a Defendant will not directly affirm, nor deny any Thing that is alledged by the Plaintiff, or which he himself alledges; and it is likewise when a Person is to answer to two Matters, and by the Law he ought to plead only to one; in which Case, in the first Part of his Plea he shall say *Protestando*, *That such a Matter is not true*, and then add, *Pro placito dicit*, for Plea saith, &c. by which Means he will not be concluded by his Plea, but may take Issue upon the other Part of the Matter.

29. **Puis Darrein Continuance**, signifies a special Plea, where some new Matter is pleaded, pending an Action, after the *last Continuance*; as where a Woman takes Husband, an Acquittance is given, or the Plaintiff enters, &c. and this Plea will be allowed at any Time after Issue, and before Verdict.

30. **Pluries**,

Of Words of Art and Terms. 127

30. **Pluries**, is the Name of a Writ that issues after two former Writs have gone out without Effect.

31. **Quantum Meruit**, is a certain Action of the Case, brought where one employs a Person to do a Piece of Work for him, without making any Agreement about the same ; in this Case it is by Law implied, that he must pay for the Work as much as shall be reasonably demanded ; that is to say, *So much as he has deserved.*

32. **Respondeas Duster**, signifies to answer over in an Action to the Merits of the Cause, &c. as where on a dilatory Plea ; or there is a Demurrer to the Plea, and it is adjudged against the Defendant, &c.

33. **Scire Facias**, is a judicial Writ that lies in divers Cases, but is most usually issued to call a Person to shew Cause to the Court whence it goes out, why Execution of a Judgment passed should not issue ; as where a Plaintiff has recovered Debt or Damages in a Court of Record, and does not take out Execution within a Year and a Day after Judgment recovered ; in that Case there must be a *Scire facias* to revive the Judgment, before the Plaintiff shall have Execution.

And where a Plaintiff or Defendant dies, Execution may not be sued out on a Judgment until the Writ of *Scire facias* is brought, and Judgment given thereupon : So it is when Judgment is recovered against a Feme Sole, who afterwards marries, the Husband must be summon'd to shew Cause why the Execution should not be awarded against him. 2 *Lilly.*

On Judgment being obtained against a Testator, a *Scire facias* issues against the Executor, tho' within a Year after the Judgment had ; for in these Cases where the Person is altered, there is to be a new Judgment to warrant the Execution.

This Writ may be likewise brought against Bail, where the Principal is not to be found, or does not surrender himself ; and there is a *Scire facias* to hear Errors, as also upon a Recognizance in *Chancery*, to extend Lands, &c.

128 Of Words of Art and Terms.

34. **Si Actionem**, is the *Latin* Conclusion of a Plea to the *Action* brought; as where a Defendant demands Judgment, *if the Plaintiff ought to have his Action*, &c.

35. **Solvit ad Diem**, is a Plea to an Action of Debt upon a Bond: or penal Bill, &c. whereby it is alledged that the Money was paid at the Day limited.

36. **Statutes of Jeofails**, are those that help divers Defects in Pleadings, after Verdict given; for it is ordained, that Judgment shall be had in any Suit after an Issue is tried, notwithstanding there may be any *Jeofail* or Mispleading.

37. **Testatum**, is a Writ that lies where a Defendant in an Action cannot be arrested upon a *Capias* in the County where the Action is laid, and thereupon that Writ is returned *Non est inventus* by the Sheriff, and it is so *testified*; in which Case a *Testatum* Writ may be sent out into any other County where the Defendant is supposed to be, or to have wherewith to satisfy.

38. **Traverse**, is a Word or Term taken from the *French*, and as used in the Law, signifies to deny a Thing alledged in a Declaration or Pleadings, &c. And a Defendant's Plea is deemed ill, wherein the Plaintiff's Title, &c. is neither traversed and denied, nor confessed and avoided; but altho' each Matter of Fact pleaded by the Plaintiff may be traversed; yet no Matter of Law may be so; nor may a Record, which is not to be tried by Jury. The formal Words of a Traverse are, *Without that*, in *Latin*, *Absque hoc*, &c.

39. **View**, is generally where a real Action is brought, and the Tenant does not certainly know what Land it is the Demandant requires; then he may pray the Jury may *view* or see the Land, &c. that is claimed: In which Case a special Writ of *Distringas* issues directed to the Sheriff, commanding him to have six of the Jury, or a greater Number of them, at the Place in Question, some convenient Time before the Trial, who shall have the whole Thing in Dispute shewn to them by two Persons named in the said Writ, and by the Court appointed.

40. **Venire facias**, is a judicial Writ, whereby the Sheriff is commanded to cause a Jury to appear, upon a Cause brought to Issue, in order to try the same; and on which Writ, if the Jury do not appear at the Day of the Return of it, then a *Habeas Corpora* shall go out, and afterwards a *Distress* until they do appear.

41. **Voire dire**, is a French Term used where there is a busy Evidence, not otherwise to be excepted against, and it is prayed upon a Trial at Law, that the Witness may speak the *Truth* on Oath, whether he shall be a *Gainer or Loser*, by the Matter in Controversy; and if it appears he is unconcerned, his Testimony is allowed, otherwise 'tis not.

42. **Uncore p̄sist**; is the Plea of a Defendant that is sued for Debt due on Bond at a Day past, wherein he says, that he tendered the Money at the Time and Place, and that there was none there to receive it; and that he is still ready to pay the same; which Plea saves the Penalty of the Obligation.

43. **Wager of Law**, is where an Action of Debt is brought against one, upon a Simple Contract, without either Deed or Record, and the Defendant in the Presence of Compurgators swears in Court, *that he owes the Plaintiff nothing*, in Manner and Form as he has declared; and here Wager of Law hath been allowed, because the Defendant may have paid the Plaintiff his Debt in private, or before Witnesses who may be all dead, and therefore the Law allows him to wage his Law in his Discharge, rather than it will suffer him to be charged by the bare Allegation of the Plaintiff.

This antient Practice of Waging Law is now much disused, since Actions of Debt are turn'd into Actions upon the Case, by which Means the Defendant is ousted of his *Ley Gager*.

VI. Of Fictions, Intendments, and Presumptions.

1. **A** *Fiction*, or feigned Construction of the Law, is when in a similitudinary and colourable Way the Law construeth a Thing otherwise than it is in Truth: And therefore *Fictions* were formerly termed an *Abuse* of our Law; but have been a long Time thought necessary, and allowed of in several Cases.

As a common Recovery is *Fictio Juris*, or a formal Device for the docking of an Estate-Tail, &c. that was contrived, when those Estates came to be inconvenient, and could not be altered for any good End or Purpose.

The Seisin of the Conusee in a Fine, is also but a *Fiction* of Law, it being only an invented Form of Conveyance to pass Estates: And in the Action of Ejectment, there is both a fictitious Lease to try the Title, and a feigned casual Ejector.

Likewise if a Bond is made at a Place beyond Sea, it may be pleaded to be done there in *Islington* in the County of *Middlesex*, by Fiction of Law, in order to try the same here, &c. 1 *Co. Inst.*

But the Law ought not in any Case to allow of Fictions, where it may be otherwise really satisfied; and there is to be Equity and Possibility in every legal Fiction.

And it is observed, that no Fiction should unlawfully work any Damage, or Injury to another. 10 *Rep.*

2. **Intendment**, in our Law, signifies the Understanding, Intention and true Meaning of a Thing; which supplies what is not fully expressed or apparent.

So that where a Thing is doubtful, Intendment may make it out; likewise many Things shall be intended after a Verdict, in a Cause; but Intendment cannot supply the Want of Certainty, in a Charge laid in an Indictment

Of Fictions and Intentments, &c. 131

Indictment for any Crime, &c. which must be expressly found. 2 *Hawkins.*

A Thing may be necessarily intended by something that goes before or follows it; and where in a Suit an indifferent Construction may bear two Intentments, it is a Rule in Law to take it strongly against the Plaintiff.

In Case a Person be bound by Bond to another, and it is not expressed to whom the Money shall be paid, or even if said to the Obligor, the Law will intend it to be payable to the Obligee, who lent it.

And where no Time of Payment is limited, the Law intends that the Money is to be paid immediately. 2 *Lilly.*

In Deeds and Contracts, the Intent of Parties is much regarded by the Law; yet it shall not take Place against the direct Rules of Law: And in Conveyances of Estates, our Law does not admit them regularly to pass by Intentment and Implication.

Tho' in Devises of Lands, they are allowed with due Restrictions, that is to say, where the Devisee must necessarily have the Thing devised by the Will, and no other Person whatsoever can have it. *Vaughan.*

No Intentment or Implication shall be allowed against an Estate limited by express Words, to drown the same.

3. **Presumption**, denotes in Law an Opinion or Belief of Things, so strong as to amount to Proof and Evidence thereof.

Where all the Witnesses to a Deed of Feoffment or other Conveyance of Lands are dead, there violent Presumption, which stands for a Proof, is continual and quiet Possession.

If where a Defendant pleads Payment to a Bond, the Debt appears by the Bond to have been of a very long Standing, and no Demand can be proved to have been made, nor Interest paid for many Years; it shall be presumed that the Bond is paid, though the Plaintiff has it in his Custody. 1 *Co. Inf.*

Also

132 Of Fictions and Intentments, &c.

Also if Rent be in Arrear for twenty Years or upwards, and the Landlord does give a Receipt for the last Year's Rent due, 'tis in our Law presumed that all the rest is satisfied.

And so in some other Instances, tho' Presumption is what may be doubted of, yet it shall be accounted true, if the contrary be not proved.

In a Criminal Case, if a Person is found killed in a House, and at the same Time a Man is seen to come out there with a bloody Sword or Knife, and no other Person was then in the House; this is a violent Presumption which will be admitted for Evidence, that that Man was the Murderer.

But here a Precaution is given, that on such presumptive or circumstantial Evidence, without other Proof by Witnesses, the Court ought not to judge hastily. *1 Inst.*



THE

THE
INDEX.

A

	Page
Accesaries	28
Accord	121
Accusation	36
Actions	36, 59
Action of Debt, Case, Account, &c.	105, 106
Administrators	95
Ambiguity	37
Appeal, to the Lords	99
Appearance	115
Arrest	<i>ibid.</i>
Assault	110
Assises	102
Assumpſit	121
Attornies	97
Audita Querela	121
Averment	122
Authority	53

B

Bail	115
Bargains and Sales	82, 83
Barristers	97
Bastards	38
Beginning	54
Bill of Exceptions	120
Burden, bearing	53
Buggery	34
Burglary	31

C

Capias	122
Cause	39
Caveat	33
	Certiorari

The INDEX.

	Page
Certiorari	99
Chancery	97
Clauſum fregit	122
Clergy	27, 28
Colour	122
Conveyances	76
Copyholds	74, 104
County-Court	102
Courts	97
Courtesy of <i>England</i>	68
Custom	4
Customs of Manors	40
D	
Declarations	115
Delays	41
Demurrer	122
Detinue	107
Descents	60, 63
Descent and Purchase	64
Distresses	88
Distribution	95
Dominion	42
Dower	69
Durels	36
E	
Ejectments	112
Elegit	123
Elopement	70
Equity	46, 49
Error	120
Estates	71
Estovers	72
Evidence	57, 131
Exchequer	100
Executions	119
Executors	52, 94
F	
False Imprisonment	123
Fee Simple Estate	65
	Fee-

The I N D E X.

		Page
Fee-Tail	—	66
Felony	—	23
Felonies, by divers Statutes	—	25
Felo de Se	—	22
Fictions of Law	—	130
Fieri facias	—	123
Fines	—	78
Force and Violence	—	54, 55
Fraud	—	50, 84
G		
Gifts	—	84
God's Law	—	4
Grants	—	40, 52, 84, 85
Grounds of Laws	—	4
H		
Habeas Corpus Writ	—	42
Habere facias possessionem	—	124
Heirs	—	43, 44
Heriots	—	75
Hue and Cry	—	31
J		
Jeofails	—	128
Ignorance	—	44, 45
Impossibility	—	47
Impotency	—	45
Inconvenience	—	54
Infants	—	46
Injury	—	45
Innuendo	—	124
Intendment of Law	—	130
Intention	—	50
Interpretation	—	37
Inventories	—	88
Jointures	—	71
Journeys Accounts	—	124
Issues	—	117
Judge	—	36
Judgment	—	119
Jury	—	117
K		

The I N D E X.

K

King	—	—	Page	55
King's Prerogative	—	—	—	55, 56
King's Bench	—	—	—	99

L

Latitat	—	—	—	124
Law, defined	—	—	—	1
Laws, Sorts of	—	—	—	2, 3
— Common, Civil, Canon	—	—	—	<i>ibid.</i>
Leafes	—	—	—	86
Leet	—	—	—	103
Libel	—	—	—	109
Liberty	—	—	—	5
Life	—	—	—	<i>ibid.</i>
Limitation	—	—	—	59
Lunaticks	—	—	—	43

M

Maihem	—	—	—	22, 23
Mandamus	—	—	—	100
Manslaughter	—	—	—	20
Marriage	—	—	—	39
Maxims of Law	—	—	—	35
— Latin Maxims Variety of	—	—	—	<i>ibid. &c.</i>
Moot Cafes	—	—	—	96
Mortgages	—	—	—	89
Murder	—	—	—	13
— By Duelling	—	—	—	16
— Killing not Murder	—	—	—	19

N

Necessity	—	—	—	49
Necessitas, Lex Temporis	—	—	—	<i>ibid.</i>
Negative	—	—	—	124
Negative Pregnant	—	—	—	<i>ibid.</i>
Negligence	—	—	—	59
Nihil dicit	—	—	—	125
Non est factum	—	—	—	<i>ibid.</i>
Non Pros.	—	—	—	<i>ibid.</i>
Nonsuit	—	—	—	<i>ibid.</i>
Nusance	—	—	—	51

The I N D E X.

O

Oaths	—	—	—	Page	97
Outlawry	—	—	—		126
Oyer	—	—	—		<i>ibid.</i>

P

Peine fort & dure	—	—	—	28
Pleas	—	—	—	116
Possession	—	—	—	42
Possessio fratris	—	—	—	51
Primogeniture	—	—	—	47
Principles of Law	—	—	—	5
Proces	—	—	—	115
Profit, reaping	—	—	—	53
Property	—	—	—	5
Protection of Subjects	—	—	—	57
Protestando	—	—	—	126
Publick Good	—	—	—	52
Punishments	—	—	—	11

Q

Quantum meruit	—	—	—	127
Quid pro quo	—	—	—	84
Quo Warranto	—	—	—	100

R

Rapes	—	—	—	33
Reasfon	—	—	—	4, 54
Recoveries	—	—	—	80
Redemption	—	—	—	89, 90
Religion	—	—	—	35
Rent	—	—	—	86
Reputation	—	—	—	109
Rescous	—	—	—	89
Respondeas ouster	—	—	—	127
Right, never dies	—	—	—	42
Robbery on the Highway	—	—	—	29
— Hundred liable for	—	—	—	31

S

Salvo Jure Regis	—	—	—	56
Salus Populi	—	—	—	57
Scire facias.	—	—	—	127

Se

The I N D E X.

Se Defendendo	Page 21
Si Action'	128
Slander	109
Statute Law	2
Substance	48, 58
Surrenders	91
T	
Tenures of Lands	65
Terms of the Law	121
Testatum	128
Transportation	27
Traverse	128
Trespals	110
Treason	5
Treasons by Statutes	10
— How dreadfully punish'd	11
— Petty Treason	12
Trials	114
Trover	118
Truth	58
U	
Venire facias	129
Verdict	118
Vigilance	59
Uncore Prist	129
Voir dire	ibid.
Voucher	80
W	
Wager of Law	129
Warranty, of Land	42
Waste	111
Wills	92
Witnesses	118
Words	48
Words of Art	121
Writs	114
Wrong	48, 49

F I N I S.

21
128
109
2
58
91
65
121
128
27
128
110
5
-10
11
-12
114
118
58
129
118
59
129
id.
80
29
42
11
92
18
48
21
14
49

Popes his fratis de feodo Simple
facit Sororem ehe Haeredem.
The Possession of the Brother, of
a Fee-Simple, makes the Sister
to be Heir.

¶ Man has given a Son & a Daughter
by one Woman or Venter, & a
Son by another, then dies seized
of Lands in Fee-Simple, & the
eldest Son enters into the Land,
after which he dies without
having any Issue; — Here the
Sister shall have the Land,
& not the younger Son or Brother,
tho' he be Heir to the Father;
but there must be an actual
Entry upon the Land, otherwise
it goes to the younger Brother
16o. Inst.

The Possession of a Brother of an
estate, daily shall not make
the Sister Heir; for it descends to

the Younger Son of the Half
Blood, who ought to have it
per formam Dom: Plowden.

~~~~~  
See Page 62.

99 P:60  
Inheritance may descend  
it can never ascend;  
and therefore